

**Criminal gang activities:**  
**A critical and comparative analysis of the statutory  
framework under South African criminal law**

by

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## **DECLARATION**

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## SUMMARY

Criminal gang activity presents a substantial threat to the lives of, in particular, the Cape Flats community in the Western Cape. This dissertation investigates the legislative response in holding gang members responsible, namely Chapter 4 the Prevention of Organised Act 121 of 1998 (“POCA”).

POCA was promulgated in order to better address a trinity of crimes, namely money laundering, racketeering and criminal gang activity (generically known as “organised crime”). Despite significant strides in combating money laundering and racketeering, the same cannot be said for criminal gang activity. In fact, the incidence of gang-related crimes has *increased* since the promulgation of the Act. During the 2017/2018 financial year, for example, more than one in every five murders (21,6%) committed in the Western Cape was gang-related.

This dissertation opens by investigating the proliferation of criminal gangs in the Cape Flats communities as well as the need for additional legislation in dealing with gang activity, rather than relying on existing means. The main reason for the promulgation of POCA was said to be the ineffective common law modalities used in dealing with group-based crime, namely the common purpose doctrine (in particular), conspiracy, incitement and public violence. These modalities were therefore scrutinised for two reasons. Firstly: to determine to what extent (and why) the common law inadequately addressed gang activity. Secondly: if the common law is still useful and how it can be developed to more effectively deal with gang activity.

A critical and comparative analysis of the threshold requirements (under Chapter 1 of POCA), specific crimes, as well as related sentencing for gang-related activity follows. Foreign and international law relating to organised crime is consulted for interpretive guidance. This analysis must be read together with the analysis of Chapters 1 and 4 of POCA under the Constitution of the Republic of South Africa, 1996. It considers both the fair trial rights of the accused, as well as in terms of the State's constitutional duty to protect its inhabitants. These analyses cumulatively elucidate the interpretive, substantive, institutional and constitutional issues with Chapters 1 and 4 of POCA. It is ultimately found that Chapter 4 of POCA is both weak and substantially similar to the common law. If we accept the assumption that the

common law is ineffective in dealing with gang activity as true, then we *must* conclude that a statutory manifestation thereof is equally as ineffective. Based on this argument, immediate statutory amendment, supplementation or replacement of both Chapters 1 and 4 of POCA is called for. In this regard, alternative legal mechanisms, as well as foreign and international law is consulted. International law is consulted in particular to address the further punishment of *gang leaders* which is dealt with inadequately under POCA.

This dissertation concludes as well as making substantive suggestions for amendments to the text of POCA as well as a new crime addressing the liability of gang leaders.

## OPSOMMING

*Kriminele bende-aktiwiteit bied 'n wesenlike bedreiging vir die lewens van veral die Kaapse Vlake-gemeenskap in die Wes-Kaap. Hierdie proefskrif ondersoek wetgewende reaksie wat bendeledede aanspreeklik hou, naamlik Hoofstuk 4 die Wet op die Voorkoming van Georganiseerde Wet 121 van 1998 ("POCA").*

*POCA is gepromulgeer om 'n triologie van misdade naamlik geldwassery, rampokkery en kriminele bende aktiwiteit (generies bekend as "georganiseerde misdaad") beter aan te spreek. Ten spyte van beduidende vordering in die bestryding van geldwassery en rampokkery, kan dieselfde nie vir kriminele bende-aktiwiteite gesê word nie. In werklikheid het die voorkoms van bendeverwante misdade sedert die promulgering van die Wet toegeneem. Gedurende die 2017/2018-boekjaar, byvoorbeeld, is meer as een uit elke vyf moorde (21,6%) wat in die Wes-Kaap gepleeg was, aan bedes toegeskryf.*

*Hierdie proefskrif begin deur die verspreiding van kriminele bendes in die Kaapse Vlake-gemeenskappe te ondersoek, asook die behoefte aan bykomende wetgewing in die hantering van bendeaktiwiteite (eerder as om op bestaande middele te staat te maak). Die hoofrede vir die promulgering van POCA was die ondoeltreffende gemeenregtelike meganismes wat gebruik is in die stryd teen groepsgebaseerde misdaad, aan te vul. Hierdie meganismes is die gemeenskaplike oogmerk-leerstuk (veral), sameswering, aanhitsing en openbare geweld. Hierdie meganismes is gevolglik weens twee redes ondersoek. Eerstens: om te bepaal tot watter mate (en waarom) die gemenerereg ondoeltreffend was om bendeaktiwiteit aangespreek. Tweedens: indien die gemenerereg steeds nuttig is en hoe dit ontwikkel kan word om meer doeltreffend bendeaktiwiteit aan te spreek.*

*'n Kritiese en vergelykende analise van die drempelvereistes (ingevolge Hoofstuk 1 van POCA), spesifieke misdade, asook verwante vonnisoplegging vir bendeverwante aktiwiteite volg. Vreemde en internasionale reg rakende georganiseerde misdaad word geraadpleeg vir leiding rakende die uitlegging van POCA. Hierdie ontleding moet met die analise van Hoofstukke 1 en 4 onder die Grondwet van die Republiek van Suid-Afrika, 1996, saamgelees word. Dit oorweeg beide die beskuldigde se reg op 'n billike verhoor, sowel as die Staat se grondwetlike*

*plig om sy inwoners te beskerm. Hierdie analises lig kumulatief die uitleggings-, substantiewe, institusionele sowel as grondwetlike kwessies van Hoofstukke 1 en 4 van POCA uit. Daar word uiteindelik bevind dat Hoofstuk 4 van POCA beide swak sowel wesenlik dieselfde is as die gemeenereg. As ons die aanname dat die gemeenereg ondoeltreffend was in die bestryding van bende-aktiwiteit as waar aanvaar, dan moet ons tot die gevolgtrekking kom dat 'n wetgewende manifestasie daarvan ewe ondoeltreffend is. Op grond van hierdie argument, word daar 'n beroep gedoen vir die onmiddellike wetgewende wysiging, aanvulling of vervanging van beide Hoofstukke 1 en 4 van POCA. In hierdie verband word alternatiewe regsmeganismes, sowel as vreemde en internasionale reg, geraadpleeg. Internasionale reg word veral oorweeg om die verdere bestrawwing van bendeleiers aan te spreek, wat onvoldoende onder POCA hanteer word.*

*Hierdie proefskrif sluit sowel af met substantiewe voorstelle vir wysigings aan die teks van POCA asook 'n nuwe misdaad rakende aanspreeklikheid van bendeleiers.*

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# Chapter 1

## Introduction

### 1.1 Research problem and objectives

South African criminal law is based on the notion of individual criminal liability.<sup>1</sup> When a person satisfies all the elements of a criminal act, through his or her personal conduct and fault, that person will be labelled as a perpetrator.<sup>2</sup> Accomplice liability furthermore arises when another person assists in the commission of a crime (either before or after its completion) but does not personally satisfy the definitional requirements of that crime.<sup>3</sup> Conceptual and legal difficulties arise, however, when groups of individuals perpetrate crimes in concert.<sup>4</sup> Issues pertaining to the complicity and causal contribution of each individual becomes apparent when the State attempts to prosecute various people for a single criminal act.<sup>5</sup> In contrast to crimes committed by individuals, group-based crime facilitates the commission of crimes due to its organised nature, sheer manpower and potential criminal networking opportunities.<sup>6</sup> Previous incorporations of group-based liability in South African law, such as the

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<sup>1</sup> See G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg *Criminal Law in South Africa* 2 ed (2015) 258-260; Burchell *Principles of Criminal Law* (2016) 5 ed 29-32; M Cowling "Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998" (1998) 11 *South African Journal of Criminal Justice* 350 368. Also see A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2014) 69.

<sup>2</sup> Burchell *Principles* 475-477; A St Q Skeen & S Hoor "General Principles: Participation" in WA Joubert & JA Faris *LAWSA* 62 ed (2010) para 116; Kemp et al *Criminal Law* 274; see also DC van der Linde 'n *Patroon van kriminele bende-aktiwiteite: Die oplossing tot Suid Afrika se bendemisdad of 'n wit olifant? 'n Kritiese, regsvergelykende en konstitusionele studie van Hoofstuk 4 van die Wet op die Voorkoming van Georganiseerde Misdad 121 van 1998* LLM dissertation, Stellenbosch University (2015) 21.

<sup>3</sup> See Cowling (1998) *South African Journal of Criminal Justice* 368.

<sup>4</sup> See KJM Smith *The Modern Treatise on the Law of Criminal Complicity* (1991) 19 where the author also refers to the "[p]rocedural, substantive and evidentiary complexities" that have traditionally been associated with criminal complicity.

<sup>5</sup> Cowling (1998) *South African Journal of Criminal Justice* 368; also Van der Linde 'n *Patroon van kriminele bende-aktiwiteite* 9.

<sup>6</sup> See Cowling (1998) *South African Journal of Criminal Justice* 368.

controversial common purpose doctrine, have led to harsh and impractical results and even resulted in an international outcry against the doctrine.<sup>7</sup>

South Africa and in particular the Western Cape has a significant criminal gang presence. This form of group-based crime currently contributes disproportionately to national and provincial crime statistics.<sup>8</sup> The South African Police Service crime statistics, for example, indicated that 21,6% of the 3 379 murders in the Western Province were gang-related.<sup>9</sup> That translates into more than one in every five murders – approximately 808. Los Angeles, which is the epicentre of the US gang problem, had 491 murders over a period of *three years*.<sup>10</sup> Despite the comparable population densities of Los Angeles (approximately four million)<sup>11</sup> and the Western Cape (approximately 6,5 million),<sup>12</sup> this translates into a disproportionately high incidence of gang-related murders per year.

The South African Legislature implemented an intervention in 1999 by promulgating the Prevention of Organised Crime Act 121 of 1998 (“POCA”) after a period during the transition into our constitutional democracy plagued by criminal gang activities and

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<sup>7</sup> See generally for critique against the common purpose doctrine L Sisilana “What’s wrong with common purpose” *South African Journal of Criminal Justice* (1999) 287 300-301; Cameron “When Judges Fail Justice” (2004) 120 *South African Law Journal*; M Reddi “The Doctrine of Common Purpose Receives The Stamp of Approval” (2005) 122(1) *South African Law Journal* 59 63-64. See the unfair consequences of the doctrine in *S v Safatsa and Others* 1988 (1) SA 868 (A) at 892, where accused number 4 was sentenced to death due to her inciting the actual perpetrators of the murder. See also Van der Linde *in Patroon van kriminele bende-aktiwiteite* 24 fn 94.

<sup>8</sup> Kruger *Organised Crime* 70.

<sup>9</sup> South African Police Service “Crime Situation in RSA Twelve Months 01 April 2017 to 31 March 2018” (11-09-2018) *South African Police Service* <[https://www.saps.gov.za/services/long\\_version\\_presentation\\_april\\_to\\_march\\_2017\\_2018.pdf](https://www.saps.gov.za/services/long_version_presentation_april_to_march_2017_2018.pdf)> (date accessed 26 October 2018) (see pages 17 and 24).

<sup>10</sup> Los Angeles Police Department “Gangs” *Los Angeles* <[http://www.lapdonline.org/get\\_informed/content\\_basic\\_view/1396](http://www.lapdonline.org/get_informed/content_basic_view/1396)> (accessed 01-12-2018).

<sup>11</sup> See United States Census Bureau “QuickFacts Los Angeles city, California, Los Angeles County, California; California” *United States Census Bureau* (01-07-2016) <<https://www.census.gov/quickfacts/fact/table/losangelescacitycalifornia,losangelescountycalifornia,CA/PST045216>> (accessed 01-12-2017); S Grad “Los Angeles hits a milestone: 4 million people and counting” *Los Angeles Times* (02-05-2017) <<http://www.latimes.com/local/lanow/la-me-historic-population-20170501-htmlstory.html>> (accessed 01-12-2017).

<sup>12</sup> Statistics South Africa *Mid-year population estimates 2017* (2017) 2.



vigilantism. The epicentre of these activities was, and still remains, the Cape Flats area in metropolitan Cape Town.

Gang-related crime in South Africa has however not subsided after this legislative intervention. It has in fact increased significantly.<sup>13</sup> Newspapers and media outlets are rife with reports of gang violence in the Cape Flats.<sup>14</sup> It was revealed during a Parliamentary Committee on Police that a seemingly impressive number of gang-related arrests were made from 1 April 2016 to 31 July 2017 – approximately 3 892.<sup>15</sup> This impressive number of arrests is immediately tempered by the number of people actually convicted under POCA: 42.<sup>16</sup> This number is somewhat confusing as only data of twenty of those convictions were supplied.<sup>17</sup> Considering the lack of available case law interpreting and implementing Chapter 4 of POCA as well as a dearth of academic commentary on the subject, it is submitted that it is imperative to understand *why* the State's legislative intervention is so patently ineffectual. Furthermore, *what* can be done to remedy the situation?

The objective of this study is to provide a critical and comparative analysis of South Africa's anti-gang legislation. This is achieved by identifying and analysing the objective (physical) and subjective (*mens rea*) requirements of the offences contained in Chapter 4 of POCA (read with the definitions in Chapter 1 and Schedule 1), as well as by determining the proper legal rationale for these crimes. The aim is to provide a comprehensive framework for the interpretation of South Africa's anti-gang legislation

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<sup>13</sup> See Chapter 2 below.

<sup>14</sup> See Chapter 2 below, especially 2.2 for an overview of the impact of gangs on these communities.

<sup>15</sup> Portfolio Committee on Police "Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape" *Parliamentary Monitoring Group* (23-08-2017) <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170823Anti-Gangsterism.pdf>> (accessed 01-09-2017). Also see Portfolio Committee on Police "Hawks Illegal Firearms Unit; SAPS Anti-Gang Strategy; Quarter 1 performance; Vetting Senior Management" *Parliamentary Monitoring Group* (23-08-2017) <<https://pmg.org.za/committee-meeting/24881/>> (accessed 01-09-2017).

<sup>16</sup> Portfolio Committee on Police "Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape" *Parliamentary Monitoring Group*.

<sup>17</sup> See Portfolio Committee on Police "Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape" *Parliamentary Monitoring Group* 22-23. According to the tables, the total number of people convicted in the Western Cape for gang-related crimes during the aforementioned period is 32 and that includes convictions for common law crimes such as murder and dealing in drugs. This author is uncertain why the Portfolio Committee decided to omit information of the other 22 convictions from the presentation.

and do so by means of statutory interpretation with reference to comparative foreign law as well as relevant international law.

Flowing from the aforementioned analysis will be specific recommendations for judicial interpretation and legislative reform of the current legal framework relating to criminal gang activities in order to better address the phenomenon.

## 1 2 Assumptions

Certain key assumptions underlie this study. Firstly: *Criminal gang activity is a major problem affecting South African communities, especially areas in the Western Cape, and is a disproportionately large contributor to the national and provincial crime statistics.* The current policing structures in the Western Cape are furthermore not adequately equipped or designed to deal with criminal gang activity.

Secondly, *South Africa's current legal framework relating to criminal gang activities (as contained in Chapter 4 of POCA) as well as the available common law mechanisms, have failed to effectively curb this phenomenon.* Chapter 4, in turn, has failed to make any noticeable impact on the criminal justice system, evidenced mainly by the lack of case law, apparent low conviction rates of gang-related offences under POCA, and no apparent decrease in gang-related crimes.

The criminal justice system is only one means to address the phenomenon of criminal gang activity. A *comprehensive strategy* also depends on governmental interventions on societal and criminological levels such as: socio-economic conditions in the poorest neighbourhoods, prison culture and overcrowding, lack of youth development and intervention in terms of the creation of job opportunities and youth mobility, and adequate education opportunities. This is in fact the approach that the State has taken in its new anti-gangsterism strategy which is addressed below. POCA and the criminal justice system as a whole are not a means to *so/ve* the gang problem in South Africa but merely to hold those who have been involved in such activities accountable and potentially reform them.

The State (the executive, legislative and to a lesser extent judicial branches) has for many years (prior to the enactment of POCA) failed to keep up with the development of transnational organised crime, including criminal gang activities, and consequently failed to uphold its constitutional (and international law) duties in terms

of section 12(1)(c) of the Constitution.<sup>18</sup> In terms of this obligation, the State is obliged to protect the safety and security of its citizens (and provide for mechanisms to realise this right). Due to the aforementioned and other contributing factors, criminal gang activity has flourished.

*South Africa is not the only country struggling with organised crime and criminal gang activities.* It is therefore useful to consider foreign jurisdictions (especially the United Kingdom, United States of America and Canada) that have made significant strides in addressing criminal gangs or organised criminality in general. These jurisdictions serve as useful sources to take cognisance of and to analyse with an eye on possible legislative reform in South Africa. It is so that the three mentioned jurisdictions are all developed countries from the “Global North”. However, it is precisely because of the similarities between the largely urban phenomenon of criminal gang activities in these countries as well as that in South Africa that the legal comparative aspects featured in this dissertation is justified.

International criminal law does not deal with the phenomenon of criminal gangs or criminal gang activities per se. However, the general part of international criminal law is very well developed in terms of group-based, systemic, and collective criminality (principles concerning joint criminal enterprise and command responsibility spring to mind). So, while criminal gang activity does not fall within the subject matter of international criminal law, this dissertation will explore the *possible lessons which domestic South African criminal law can take from the general part of international criminal law* in terms of modes of liability and other aspects relevant for complex group-based, collective and systemic criminality.

1 3            For whom does the bell toll?

1 3 1            *Understanding the elusive concept of a “gang”*

The concept of gangsterism and what precisely constitutes a *criminal* gang remains contentious. The meaning of “criminal gang” has been legislatively defined through

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<sup>18</sup> 12(1)(c) states that “[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources”.

POCA. Unfortunately, the definition lacks clarity due to its broad terms and is subject to criticism.<sup>19</sup> The definition in Chapter 1 reads that a

'criminal gang' includes any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity[.]

Over and above this definition, section 11 of POCA proves five factors a court may take into consideration in determining whether a person is a *member* of a gang

- (a) admits to criminal gang membership;
- (b) is identified as a member of a criminal gang by a parent or guardian;
- (c) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
- (d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

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<sup>19</sup> See especially 4 5 1, 5 3 2 2 and 7 2 below.

Several commentators (mainly in the fields of criminology,<sup>20</sup> psychology<sup>21</sup> and other social sciences)<sup>22</sup> have tried to identify common themes in an attempt to capture the essence of a criminal gang.

There is value in understanding generic perceptions or academic descriptions of what gangs exactly are in order to better understand and interpret Chapter 4 of POCA and to inform policy decisions.<sup>23</sup> Standing, however, admits that South African scholarship is characterised by “brief, superficial definitions”.<sup>24</sup>

Gastrow reckons that it is problematic to encapsulate one single definition of what a gang is and writes that it may not “ever be adequate or comprehensive enough to cover all the shades and variations”.<sup>25</sup> He does offer certain trite characteristics such

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<sup>20</sup> Prominent examples include Don Pinnock (see D Pinnock *Gangs, Rituals and Rites of Passage* (1997); D Pinnock *The Brotherhoods: Street Gangs and State Control in Cape Town* (1984); D Pinnock *Gang Town* (2016); D Pinnock *Towards and Understanding of the Structure, Function and Causes of Street Gangs in Cape Town* MA thesis University of Cape Town (1982)) & André Standing (see A Standing “Re-Conceptualising Organised Crime” (2003) 12(3) *African Security Review* 102; A Standing “The threat of gangs and anti-gangs policy: Policy discussion paper” (2005) Paper 116 *Institute for Security Studies* 1; A Standing *Organised Crime: A study from the Cape Flats* (2006)).

<sup>21</sup> Prominent examples include Wilfried Schärf (see W Schärf & C Vale “The Firm – organised crime comes of age during the transition to democracy” *Social Dynamics: A journal of African studies* (1996) 22(2) 30; W Schärf “The Resurgence of Urban street gangs and community responses in Cape Town during the late eighties” in D Hansson & D Van Zyl Smit (eds) *Towards Justice: Crime and State Control in South Africa* (1990) 232) & Brian van Wyk (see BE Van Wyk & WH Theron “Fighting gangsterism in South Africa: a contextual review of gang and anti-gang movements in the Western Cape” (2005) 18(3) *Acta Criminologica* 51 51).

<sup>22</sup> Prominent examples include Irvin Kinnes (see I Kinnes *Contested Governance: Police and Gang Interactions* PhD thesis (Criminology) University of Cape Town (2017); I Kinnes “Gangs, drugs and policing in the Cape Flats” (2014) 2 *Acta Criminologica* 14; I Kinnes *From urban street gangs to criminal empires: The changing face of gangs in the Western Cape* (2000), Institute for Security Studies), Marcelle Wijnberg (see M Wijnberg *Exploration of Male Gang Members’ Perspectives of Gangs and Drugs* MA (Social Work) thesis University of Stellenbosch (2012)) & Derica Lambrechts (see Lambrechts D *The Impact of Organised Crime of Social Control by the State: A Study of Manenberg in Cape Town, South Africa* DPhil thesis University of Stellenbosch (2013)).

<sup>23</sup> See Standing *Cape Flats* 251.

<sup>24</sup> Standing *Cape Flats* 251.

<sup>25</sup> P Gastrow “Organised Crime in South Africa: An Assessment of its Nature and Origins” (08-1998) *ISS* <<https://issafrica.s3.amazonaws.com/site/uploads/Mono28.pdf>> (accessed 14-11-2016). Also see I Kinnes “From urban street gangs to criminal empires: *The changing face of gangs in the Western Cape*” (2000) *ISS* <<https://oldsite.issafrica.org/uploads/Mono48.pdf>> (accessed 01-11-2015); Burchell *Principles* 909-910.

as that gangs are often “territorially based” and their criminal operations are less sophisticated than syndicates, they consist of youths rather than older persons and lastly that they are definable by a (common) name. This view is echoed by Shaw, who holds that syndicates operate at a higher degree of sophistication and at a wider level than gangs. He further submits that gangs typically operate at “street level” and are often employed by these syndicates to do their “dirty work”.<sup>26</sup> The author constructs the following definition:

A criminal gang consists of an organised group of members which has a sense of cohesion, is generally territorially bound, which creates an atmosphere of fear and intimidation in the community and whose members engage in gang-focused criminal activity either individually or collectively.<sup>27</sup>

This definition differs substantially from the legal definition as it does not require a minimum number of members and the impact on the community is emphasised and is reminiscent more of a definition of terrorism.<sup>28</sup> It is however trite, from media reports

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<sup>26</sup> M Shaw “The development and control of organized crime in post-apartheid South Africa” in S Einstein & M Amir (eds) *Organized crime: Uncertainties and dilemmas* (1999) 99. Also see Standing *Cape Flats* 251.

<sup>27</sup> Gastrow “Organised Crime in South Africa: An Assessment of its Nature and Origins” *ISS*. The author states that he obtained elements of this defection from G Cronje, PJ van der Walt, GM Retief & CMB Naudé *The Juvenile Delinquency in Society* (1982).

<sup>28</sup> The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 defines an array of activities as a “terrorist activity” in terms of section 1 of the Act. Relevant here is paragraph (b)(ii) which reads that a terrorist activity as an activity

(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to-

(...)

(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population [...]

and the preamble to POCA,<sup>29</sup> that the communities of the Cape Flats area are in fact terrorised and traumatised by gang-related activities.<sup>30</sup>

Kinnes lists certain elements that are present in prevailing gang definitions:<sup>31</sup>

- Gang members may range in age from youngsters ('corner kids') to adults between 20 and 40 years of age.
- The nature and activities of gangs are mainly determined by their social context.
- Membership of gangs may include persons both inside and outside of jails.
- Gang members may be anything from street level operators to sophisticated syndicate bosses.
- They may belong to the category regarded by the government and its agencies as being at risk of becoming involved in criminal activities or may make a choice to become involved with full cognisance of the associated risks.
- Gangs may be involved in criminal activities for the sake of survival, or may be high-level, structured criminal organisations.

Standing is critical of this lack of clarity (and consensus) in the definition of gangs, while there is no "open disagreement" among leading commentators, who seem to tacitly accept this elusive concept that has no universally accepted definition. The author states that during an interview with a senior member of the Department of Community Safety, that member stated that "[t]here is no confusion, we all know who is a gangster and who isn't. That's not a problem".<sup>32</sup>

Wijnberg correctly refers to the fact that no single or universal definition exists for a gang and posits that every gang is unique in nature. This unique nature of the gang is determined by several factors such as environment, socio-political and economic

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<sup>29</sup> It is stated in the preamble that

(...) [T]he pervasive presence of criminal gangs in many communities is harmful to the well being [sic] of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities [.]

<sup>30</sup> These reports shall be discussed in detail in Chapter 2.

<sup>31</sup> I Kinnes "From urban street gangs to criminal empires: *The changing face of gangs in the Western Cape*" (2000) ISS.

<sup>32</sup> Standing *Cape Flats* 253.



contexts. Furthermore, internal belief systems differ between gangs.<sup>33</sup> Gangs additionally vary in size, structure and type of criminal activity.<sup>34</sup> The concept of a cohesive and organised criminal gang may not always be the case. Structures often evolve, merge or dissolve frequently and may be venture-specific.<sup>35</sup> An attempt to create an all-encompassing or universal definition for a “criminal gang” is thus a close to impossible task.<sup>36</sup> It can be argued that the current statutory regime is aimed at a very specific species of criminal gangs and ignores their inherently flexible nature. Statutory definitions may then also pose the risk of causing gangs to become wise of statutory proscriptions and then develop in order to circumvent them.<sup>37</sup> In this sense a flexible or elastic definition (albeit constitutionally suspect) may prove to be extremely useful to the State.

Legal definitions aside, there seems to be some experiential, common sense or popular understanding of what (*criminal*) gangs entail. Pinnock observes how young children in gang-affected communities, when asked to provide a definition of a gang, instead pointed out gang members. In a different community, when asked the same question, a group of men proudly identified themselves as a gang.<sup>38</sup> This illustrates the elusive nature of a definition of the concept of a criminal gang despite an underlying understanding thereof. The inability for people to provide a definition just emphasises how ineffective it is to attempt to define the term. It can therefore be argued that the concept, understanding or definition of a gang falls outside the scope of a strict legal understanding and again underscoring that a flexible or elastic definition may be required to cast the criminal net wide enough.

Before we get to the legal analysis, then, it is first necessary to look at the phenomenon of gangsterism in the broad, sociological sense of the word. The starting point is to identify a typology of the phenomenon of gangsterism.

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<sup>33</sup> See Wijnberg *Exploration* (2012) 38. Also see the testimony by Professor Catherine Ward for the Khayelitsha Commission *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (2014) 340.

<sup>34</sup> RW Lee “Transnational Organised Crime: An Overview” in T Farer (ed) *Transnational Crime in the Americas* (1999) 12; Burchell *Principles* 910; Khayelitsha Commission *Khayelitsha Report* (2014) 168.

<sup>35</sup> P Gastrow “Organised Crime in South Africa – An Assessment of its Nature and Origins” *ISS*.

<sup>36</sup> See Burchell *Principles* 909-910.

<sup>37</sup> Burchell *Principles* 909-910.

<sup>38</sup> D Pinnock *Gang Town* (2016) 90.



### 1 3 2 *Brief overview of the types of gangs*

Pinnock identifies certain variations of gangs which are prevalent particularly in the Western Cape.<sup>39</sup> The author describes **merchant gangs** as the “face” of gangs as this appears to be the most common or well-known type of gang. Merchant gangs predominantly buy and sell drugs to members of the community; with collateral activities being gun violence and robbery. The genesis of so-called gang wars can often be attributed to the expansion and retention of gang territories.<sup>40</sup> The situation might be slightly more nuanced. In areas such as Manenberg, which is relatively densely populated, the issue is often rather loyalty towards certain drug merchants of certain gangs. Competitive pricing and a better-quality drug may cause a client to change suppliers and consequently cause inter-gang conflict.<sup>41</sup> Pinnock succinctly describes the situation as follow:

(...) [D]rugs largely drive Cape Town’s stratospheric level of interpersonal violent crime. Users rob and steal to get them, gangs murder to retain their sales turf and drug lords hold neighbourhoods in thrall by violence.<sup>42</sup>

**Prison gangs**, which are not the focus of this study,<sup>43</sup> operate mainly within prisons. The most infamous prison gangs are the 26s, 27s and 28s – collectively known as “the Numbers gangs”. These gangs have strict codes of conduct, their own languages and often-violent gang initiations.<sup>44</sup> “**Ordinary**” gangs (who operate on “street-level”) appropriating the strict hierarchal organisation of prison gangs have become commonplace both to ensure compliance with orders from higher ranking members as

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<sup>39</sup> See Pinnock *Gang Town* 83-130.

<sup>40</sup> South African Police Service *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report* (2016) 80.

<sup>41</sup> See Pinnock *Gang Town* 111.

<sup>42</sup> Pinnock *Gang Town* 225.

<sup>43</sup> Despite the fact that gang criminality is rife under amongst the prison population, the State’s priority is not to prosecute and pursue these activities but rather those affecting the general population. This is clear from the preamble, case law and parliamentary discussions and media reports. This dissertation is therefore focused on interpreting Chapter 4 of POCA through the lens of gangs affecting the general population (or “ordinary gangs”).

<sup>44</sup> Pinnock *Gang Town* 98-107.

well as to provide organisational resistance to sophisticated criminal syndicates that wanted to encroach on their drug territories.<sup>45</sup>

POCA is indiscriminate in its application. It applies equally to those who are corner kids as to those who are hardened killers. The only question in terms of POCA is whether these persons were members or active associates (where applicable) of the gang.

#### 1 4 The four pillars and the State

It is imperative to contextualise this study, which focuses predominantly on the *legal* aspects of dealing with gang-related activity, within the current *policy* framework of the South African Government. The National Anti-Gang Strategy (“the Strategy”) was approved in February of 2017 and focuses on pillars which must work in synergy.

The *first pillar* is human development which focuses on school safety; social cohesion and sustainable communities; the promotion of healthy communities; improving service delivery; economic development. The aim of this pillar seems to be empowerment and development of communities which in part then also addresses unemployment, poverty and inequality.<sup>46</sup>

The *second pillar* focuses on social partnerships. The partnership here is between (local) governments and communities, and local communities are advised to utilise the policy to implement community safety forums as well as to provide structures for partnerships where communities can address their safety concerns.<sup>47</sup> The Department of Social Development is then responsible for the coordination and monitoring to delivery and progress of an Integrated Crime Prevention Strategy. The National Youth Development Agency is further tasked with implementing a Youth Strategy which creates and implements youth programmes.<sup>48</sup>

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<sup>45</sup> Pinnock *Gang Town* 105.

<sup>46</sup> Western Cape Department of Community Safety “Implementing the National Anti-Gangsterism Strategy” (02-12-2017) <[https://www.westerncape.gov.za/assets/departments/community-safety/presentation\\_nags\\_workshop\\_gang\\_strategy.pdf](https://www.westerncape.gov.za/assets/departments/community-safety/presentation_nags_workshop_gang_strategy.pdf)> *Western Cape Government* (accessed 01-10-2017).

<sup>47</sup> Western Cape Department of Community Safety “Implementing the National Anti-Gangsterism Strategy” *Western Cape Government*.

<sup>48</sup> Western Cape Department of Community Safety “Implementing the National Anti-Gangsterism Strategy” *Western Cape Government*.

Special design is listed as the *third pillar*. This relates to the “redesign of public spaces and homes” which must alleviate overcrowding and “build integrated community facilities” in gang-plagued areas.<sup>49</sup>

Arguably the most important pillar (at least in the context of this study) is the *fourth pillar*, namely the criminal justice process. Community mobilisation and safety is additionally highlighted – which is done through community safety forums and community policing forums.

## 1 5 Research method

### 1 5 1 Methodology & sources

This dissertation is predominantly analytical and doctrinal in nature and will be conducted by means of a literature review of various relevant sources, including legislation, international instruments, case law, policies and academic literature (including textbooks, journal articles and opinions) pertaining to group-based criminal liability.

The focus of the study will be the phenomenon of criminal gang activities. The South African common law (including the historical origins and judicial development) prior to the promulgation of POCA will be analysed in order to identify the difficulties the State faced in the prosecution of individuals involved in criminal gang activities. Thereafter the State’s legislative response, in the form of POCA, will be *constructed*. Such a construction will have to take place largely from a theoretical and doctrinal perspective considering the lack of case law and academic literature specifically pertaining to Chapter 4 of POCA. This construction and interpretation will also include comparable case law on Chapter 2 of POCA, namely offences relating to *racketeering* activities.<sup>50</sup> It should be mentioned that POCA does not criminalise organised criminality in the generic sense.

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<sup>49</sup> Western Cape Department of Community Safety “Implementing the National Anti-Gangsterism Strategy” *Western Cape Government*.

<sup>50</sup> STEP forms part of the Californian Penal Code. To date, there has been only one reported case implementing and interpreting Chapter 4 of POCA Chapter 2, on the other hand, which deals with offences relating to racketeering activities, has a rich body of case law and a comparable model of criminalisation to Chapter 4. Furthermore, the parent legislation of Chapter 4 (STEP) is based on the RICO-model of the USA, while Chapter 2 is also based on the RICO model.

This study is also strongly comparative in nature. Although several jurisdictions will be referred to and relied on throughout this study, two jurisdictions, namely the United States of America (“United States”) and Canada, will form the bulk of the comparison. The aforementioned jurisdictions were chosen for very specific reasons (and not *solely* because of the obvious common heritage in English criminal law doctrine which also strongly influenced the development of general principles of South African criminal law).<sup>51</sup> Chapter 4 of POCA is largely based on American legislation, namely the California Street Terrorism Enforcement and Prevention Act of 1988 (“STEP”).<sup>52</sup> In order to adequately understand Chapter 4 of POCA, it is unavoidable and essential to analyse its “parent” legislation. This comparative methodology will go further by reviewing the four main models of criminal gang liability in various other jurisdictions and comparing them with the South African approach. These models will be reviewed by illustrating the implementation of these models in various foreign jurisdictions (through legislation and its interpretation in case law). Canada offers a dynamic and arguably quite a harsh solution for punishing *gang leaders*.<sup>53</sup> Considering South Africa’s lack of express gang leadership criminalisation, it would be useful to analyse the Canadian perspective.

Throughout the study, reference will be made to South Africa’s constitutional and international law duties. Firstly, it has to be determined whether the required constitutional balance between the protection of the safety and security of South African citizens (entrenched in section 12 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”)) and the protection of the rights of an accused (in terms of section 35(3)) have been achieved. The Constitution plays a significant role in this dissertation. The role of the Constitution is dual-functional. It firstly serves as a

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<sup>51</sup> South African (substantive) criminal law was, of course, also influenced by Roman-Dutch and German criminal law principles.

<sup>52</sup> SG Lebeya *Defining organised crime: a comparative analysis* LLD thesis UNISA (2012) 104; M Cowling (1998) *South African Journal of Criminal Justice* 370.

<sup>53</sup> According to section 467.13(1) of the Canadian Criminal Code (“the Criminal Code”), the so-called “instructing offence” is committed by

[e]very person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

normative *framework* in which all law must operate. This is quite patent from section 2 of the Constitution which holds that it is “(...) the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the *obligations imposed by it must be fulfilled*”.<sup>54</sup> The Constitution also serves as a *protection mechanism* and this is patent from the rights and protections afforded in particular Chapter 2 – the Bill of Rights. It has also been said that “[t]he primary, traditional role of human rights is to afford protection from the criminal law”.<sup>55</sup> It will thus be impossible, at least for purposes of this dissertation, to facilitate a conceptual separation between the Constitution as a *normative* document and the Constitution as a *protection mechanism*.

Further, reference must be made to the fact that South Africa is a party to the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (“the Palermo Convention”).<sup>56</sup> The aim of this Convention is, *inter alia*, to assist in the investigation and prosecution of (transnational) organised crime through the adoption of new statutory crimes that are in line with the guidelines contained in it.<sup>57</sup> It will be investigated whether South Africa has satisfied its obligations in terms of this instrument, considering the growing transnational nature of organised crime threatening the security and economy of countries throughout the African continent.<sup>58</sup>

It was noted previously that criminal gangs/criminal gang activities are not criminalised under international criminal law. None of the existing international criminal tribunals (including the International Criminal Court) can at present exercise

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<sup>54</sup> Own emphasis.

<sup>55</sup> F Tulkens “The Paradoxical Relationship between Criminal Law and Human Rights” (2011) 9 *Journal of International Criminal Justice* 577 579. Also see especially 5 1-5 3 below.

<sup>56</sup> United Nations Convention against Transnational Organized Crime and the Protocols Thereto (adopted 14 December 2000, entered into force 20 February 2004) 40 ILM 335. Also see 4 3 2 below.

<sup>57</sup> United Nations Office on Drugs and Crime “Legislative Guides for The Implementation of The United Nations Convention against Transnational Organized Crime and The Protocol Thereto” (2004) *United Nations Office on Drugs and Crime* <[http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)> (accessed 06-06-2015) xvi.

<sup>58</sup> P Gastrow *Penetrating state and business: organised crime in Southern Africa* (2003) 1. Also see *Mohunram and Another v NDPP and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC) para 144 where Sachs J elaborates on the reasons for the promulgation of POCA (as found in the long title); *Standing Cape Flats* 45 where the author refers to the former Minister of Justice and Constitutional Development who criticized the previous government for its failure to keep up with transnational organised crime.

jurisdiction over the crime of criminal gang activities (or similar offences). However, the general part of international criminal law (notably the modes of liability, including the doctrine of joint criminal enterprise and the notion of command responsibility) may potentially be useful in terms of the development of general principles for the criminal liability of members of a criminal gang; or participants in criminal gang activities. Reference will thus be made to relevant principles of international criminal law.

## 1 5 2 *Delineations*

Certain delineations or demarcations of this dissertation must be emphasised. This dissertation falls squarely in the field of criminal law – with necessary interactions with the law of evidence; criminal procedure; constitutional law; foreign and international law. Although there will be frequent reference to local history, social science and criminology (in particular this chapter, Chapter 2 and to a lesser extent Chapter 4), this author does not purport this study to be one falling within those fields. The aforementioned references to the social sciences are utilitarian in nature to contextualise key concepts.

Sociological aspects such as the functioning and composition of individual gang types, criminal syndicates and organised crime in the generic sense are similarly not under consideration. References to these concepts shall however be made, again, for contextual purposes.

## 1 6 Structure of chapters

**Chapter 2** explains the historical background to the phenomenon of criminal gang activity in South Africa. It will explore the impact of gang activity in the most affected area, namely the Cape Flats in the Western Cape. A broad overview of past governmental strategies as well as available statistics will be provided. The Chapter will additionally investigate the causative factors and history that led to the development and proliferation of gangs towards the late 1990s and the eventual legislative intervention that led to the promulgation of POCA. Finally, the rationale for the further criminalisation of existing criminal offences will be discussed. For example, it is already an offence to aid and abet a crime (for example murder); or to be a co-conspirator or inciter to a crime; or a participant in a common criminal plan under the common law. But under POCA (chapter 4) it may also constitute a crime if such a person “wilfully aids and abets any criminal activity committed for the benefit of, at the

direction of, or in association with any criminal gang”.<sup>59</sup> Two preliminary answers arise to the question of what the rationale is to further criminalise existing criminal conduct. The first is that the new crime may cover conduct that may fall outside the scope of existing crimes. The second is that the sentencing regimes might differ between the two crimes. The possibilities shall be discussed in depth in Chapters 3 and 4.

**Chapter 3** analyses and provide a comprehensive framework to the research, focusing on the common law measures which deal with group-based crimes. These common law mechanisms include the inchoate or incomplete crimes of incitement,<sup>60</sup> conspiracy and attempt,<sup>61</sup> as well as the common purpose doctrine.

One of the reasons underlying legislative intervention by means of POCA was the perceived deficiency of the common law and legislation that have failed to keep up with the organised crime, racketeering, money laundering and criminal gang activity.<sup>62</sup> It will also be investigated to what extent the common law and statutes have failed to be judicially developed. Furthermore, it will be shown that the lack of development caused the common law and statutory measures to lag behind the growing phenomenon of transnational organised crime.<sup>63</sup> Snyman contends that the aforementioned incomplete crimes somewhat overlap with section 9 of POCA and questions whether these statutory measures are necessary if they are only common law crimes under the guise of new crimes.<sup>64</sup> This claim shall be evaluated in this and the subsequent Chapter. Finally, it shall continuously be evaluated whether these measures are still useful in the fight against gang-based crimes; and whether these measures could still be advantageous via judicial development.<sup>65</sup> There will be a focus on the common purpose doctrine and its doctrinal and constitutional issues as it is probably the closest measure the common law has to offer in terms of group

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<sup>59</sup> Section 9(1)(a) of POCA.

<sup>60</sup> In terms of the Riotous Assemblies Act 17 of 1956.

<sup>61</sup> Snyman (1999) *South African Journal of Criminal Justice* 218; JM Burchell *South African Criminal Law & Procedure Vol 1* 4 ed (2011) 537.

<sup>62</sup> See 3.1 below.

<sup>63</sup> *Standing Cape Flats* 45.

<sup>64</sup> Snyman (1999) *South African Journal of Criminal Justice* 217 as well as Chapters 3 and 4 below.

<sup>65</sup> Section 39(2) of the Constitution states “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.



criminality. The joint criminal enterprise doctrine, developed in international criminal law (notably the case law of the International Criminal Tribunal for the Former Yugoslavia) and which is comparable to the South African common purpose doctrine, will be analysed with an eye on the development of existing general principles.<sup>66</sup>

**Chapter 4** will provide an overview of the legislative background to the promulgation of POCA towards the end of the 1990s. Anti-gang legislation of the US and Canada shall also be discussed as interpretive tools in understanding and constructing the elements of POCA (Chapter 4). Chapter 2 of POCA, which deals with racketeering and which is analogous in structure to Chapter 4, shall also be discussed, considering the lack of case law and academic materials interpreting POCA Chapter 4.

Comparable international law will also be analysed and discussed. This approach is reaffirmed by section 233 of the Constitution, which states that courts must prefer a reasonable interpretation of legislation that is in conformity with international law above an interpretation that is inconsistent therewith. As mentioned previously, South Africa is a party to the Palermo Convention. The Palermo Convention imposes the obligation on member states to promulgate legislation to deal with, *inter alia*, the participation in an “organized criminal group”.<sup>67</sup> It will be determined whether Chapter 4 of POCA satisfies its minimum obligations in terms of the Palermo Convention.

The developed strategies of European jurisdictions are also instructive in this regard. The Council of Europe has adopted a joint action and made it a criminal offence to participate in a criminal organisation in the Member States of the European Union.<sup>68</sup> This joint action will also be analysed and compared (for definitional assistance) with the Palermo Convention, which echoes the joint convention by creating similar group-based criminal offences.<sup>69</sup>

The main focus of this Chapter is to identify and analyse the objective and subjective requirements of the crimes listed in Chapter 4 of POCA. This will be done through an analysis of the traditional elements of the crime, namely the requisite *actus*

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<sup>66</sup> For example, the joint decision by the Privy Council and the House of Lords in *R v Jogee* [2016] UKSC 8.

<sup>67</sup> Article 5(1).

<sup>68</sup> Official Journal of the European Communities L 351/1.

<sup>69</sup> See GP Kemp “The United Nations Convention Against Transnational Organized Crime: A milestone in international criminal law” (2001) 14 *South African Journal of Criminal Justice* 152 155-156.



*reus* (unlawful conduct), causation and *mens rea* (fault). There will however be specific focus on the requisite *actus reus* and *mens rea*. The latter element was drafted vaguely, as well as ambiguously by the legislature.

The elements of the definition of a “criminal gang” and “a pattern of criminal gang activity” shall also be identified as these definitions are extremely important to the function of Chapter 4 of POCA.

Continuing the discussion started in Chapter 3, it shall be analysed to what extent the crimes enumerated in POCA Chapter 4 differ from crimes that pre-existed POCA. It is vital to the justification of POCA that the crimes under POCA *differ* from the pre-existing crimes otherwise POCA Chapter 4 should be considered redundant.

An additional important aspect to consider is the sentencing regime under POCA. Section 10 of POCA prescribes certain ranges of punishment including imprisonment with the option of a fine in certain instances. A nuanced sentencing regime is also vital for the justification of POCA. Important considerations such as restorative and child justice shall also be considered here. Restorative justice may be a viable consideration as communities are left harmed by gang-related crime. The Child Justice Act 75 of 2008 (“the CJA”) provides for diversion orders which is aimed keeping children out of the harsh criminal justice system.<sup>70</sup> Alternative (non-punitive) measures may be utilised and these measures often include restorative processes.<sup>71</sup>

**Chapter 5** will investigate whether Chapter 4 of POCA is constitutionally sound. The Chapter shall however first be contextualised as POCA creates a constitutional dichotomy. The State is firstly obliged to protect its inhabitants from all forms of violence,<sup>72</sup> which requires the enactment and enforcement of criminal laws. However, on the other side of this dichotomous relationship is the constitutional rights of the accused which are equally as important to protect.<sup>73</sup>

Several constitutional concerns arise from reading POCA Chapter 4. One of the main concerns is the use of previous convictions (which is usually considered as irrelevant and prejudicial during the trial stage) to form the required pattern of criminal

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<sup>70</sup> See especially Chapter 8 of the CJA.

<sup>71</sup> See 4.5.3 below.

<sup>72</sup> Section 12(1)(c).

<sup>73</sup> Mainly entrenched in section 35 of the Constitution.

gang activity, which is the core of POCA Chapter 4. The legal basis for punishing this crime must ultimately be determined and considered whether it does not offend against an accused's right to a fair trial in section 35(3) of the Constitution. Once again, the foreign jurisdictions of Canada and the US will be used as a comparative tool. Secondly, POCA Chapter 4 (with reference to the definitions in Chapter 1) will be scrutinised in light of the principle of legality – which is also enshrined in section 35(3) of the Constitution. Section 10(3) of POCA provides for increased punishment of gang members for crimes which are not gang-related and *merely* because they are gang members. This provision shall be scrutinised as it may offend the freedom of association, as well as other relevant constitutional and criminal law norms.

**Chapter 6** will analyse foreign law and international law strategies utilised to combat criminal gang activities and complex, group-based crimes. These will be compared with the relevant South African criminal law principles. An overview of the four main models for the criminalisation of organised crime structures will be provided. These models<sup>74</sup> are: the conspiracy model;<sup>75</sup> the participation model;<sup>76</sup> the enterprise model<sup>77</sup> and the labelling/registration model.<sup>78</sup> Several foreign jurisdictions will be utilised to illustrate these including the Singaporean Societies Act 56 of 1966 (which makes it an offence to belong to an unlawful society); the New South Wales Crimes (Criminal Organisations Control) Act 2012 no 9 and US civil law injunctions. It will be evaluated whether South Africa's regime is currently effective compared to these foreign models and if one of the other models could be applied in the South African context.

International criminal law will once again be discussed here as a means to find an appropriate model for the criminalisation of *gang leaders*. It must be emphasised that Chapter 4 of POCA does not contain express provisions criminalising the conduct or

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<sup>74</sup> See A Schloenhardt *Palermo on the Pacific Rim: Organised Crime Offences in The Asia Pacific Region* (2009) 15-17.

<sup>75</sup> As described in the Palermo Convention and found in Australia, Singapore and Malaysia. See Schloenhardt (2009) 15.

<sup>76</sup> Also found in the Palermo Convention, the US STEP Act, Canada, New South Wales, New Zealand and Taiwan. See Schloenhardt (2009) 15.

<sup>77</sup> The most well-known example being the United States RICO Act.

<sup>78</sup> Found in jurisdictions such as Hong Kong, Japan and South Australia. See Schloenhardt (2009) 15.

involvement of gang leaders.<sup>79</sup> Of particular importance in this context is the doctrine of command responsibility. This doctrine provides for a form of vicarious liability for military and civilian leaders under international law and is commonly used in international criminal tribunals. It will be argued that gangs operate in a comparable fashion and that gang leaders should bear the responsibility for the deeds of their subordinates. It will be argued that the leaders can be held liable through an adjusted form of this doctrine – both in the active and the passive form. The active form criminalises criminal orders given by a leader while the passive form relies on the leader's failure to act and prevent harm caused by their subordinates.<sup>80</sup>

Another doctrine flowing from international as well as foreign law is the doctrine of innocent agent or control through an organisation. *Organisationsherrschaft* (in terms of German law)<sup>81</sup> and control through an organisation under the Rome Statute of the ICC<sup>82</sup> provide for the responsibility of a superior in a hierarchal relationship to be held responsible for the actions of his or her subordinates, independent of the criminal responsibility of the subordinate.

**Chapter 7** draws conclusions based on the findings of the preceding chapters. Specific suggestions for judicial development and legislative reform will be made.

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<sup>79</sup> As will be noted below, the closest provision is section 9(2)(b) which criminalises the inducement to contribute to criminal gang activities. Section 2(1)(f) criminalises the management of an enterprise under the racketeering provisions of POCA. This is however a distinct offence and does not directly punish a gang leader for his role as such. See 4 4 1-4 4 5; 4 5 2 5; 6 2, 6 4 & 6 5 below.

<sup>80</sup> Danner & Martinez (2004) *California Law Review* 120-121.

<sup>81</sup> In terms of section 25 of the German Criminal Code 1998 (*Strafgesetzbuch*).

<sup>82</sup> Article 25(3)(a).

## Chapter 2

# The development of criminal gangs in the Cape Flats and the rationale for criminalisation

“Today we have hundreds of police protecting us but we never have that in our communities. We demand our right to be protected and to be safe in our communities.”<sup>83</sup>

### 2 1 Introduction

This Chapter aims to contextualise the modern state of criminal gang activities in South Africa. For illustrative purposes the Chapter will discuss the development of criminal gangs in the Western Cape and the reasons for their proliferation. Finally, the underlying rationale for the criminalisation of gangs will be investigated and whether *criminalisation* is in fact the appropriate response to this phenomenon.

### 2 2 Criminal gang activities in modern South Africa

Criminal gang activity is not a recent phenomenon; it started intensify and gained national and governmental attention since the early 1990s.<sup>84</sup> During the period between 1997 and 1999 gang membership had increased somewhere between 32% and 100%.<sup>85</sup> Certain estimates suggest that the cumulative gang membership ranges between 80 000 and 100 000 gang members in the Cape Flats alone<sup>86</sup> and these gangs contribute up to 70% of all crime committed within the Cape Flats area in the

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<sup>83</sup> Statement by Roegshanda Pascoe, chairperson of the Manenberg Safety Forum during a march on Freedom Day to parliament protesting the violent presence of gangs in the Manenberg community – C Booyesen “March because gang violence victims ‘are not free’” (28-04-2017) *IOL* <<http://www.iol.co.za/capetimes/news/march-because-gang-violence-victims-are-not-free-8846044>> (accessed 05-08-2017).

<sup>84</sup> A Standing *Organised Crime: A study from the Cape Flats* (2006) ix. It must also be noted, firstly, that reliable regarding gang-related incidents statistics of crime were dearth and seemingly (sometimes) subject to speculation.

<sup>85</sup> BE Van Wyk & WH Theron “Fighting gangsterism in South Africa: a contextual review of gang and anti-gang movements in the Western Cape” (2005) 18(3) *Acta Criminologica* 51 51.

<sup>86</sup> I Kinnes “From urban street gangs to criminal empires: The changing face of gangs in the Western Cape” (2000) Monograph 48 *ISS* 10.

Western Cape.<sup>87</sup> It is believed that approximately 130 gangs<sup>88</sup> (in various manifestations and factions) operate in this area and that one of these gangs, the Americans, has 5 000 members.<sup>89</sup> Gangs of this size are known as “supergangs” and may, due to their size, infrastructure and influence, start operating as international/transnational syndicates.<sup>90</sup>

The State appears to have only focused on reporting gang-specific data from the 2000s. Towards the end of the 1990’s the Institute for Security Studies (ISS) however conducted a survey in the Western Cape concerning gang violence in that province. In the ISS report, it was indicated that approximately 28% of assaults, 40% of sexual assaults and 41% of robberies in the province were gang-related.<sup>91</sup>

When the State eventually decided to report gang-specific incidents of violence, it was typically grouped together with other types of crime, such as racially and politically motivated incidents under, for example, assault. In a report by Statistics South Africa on crime between 2011 to the end of 2015, gang-related incidents of violence contributed approximately 8,3% (23 541 incidents) towards assault.<sup>92</sup> Gang or group-motivations have furthermore contributed approximately 12,8% (2 317 incidents) towards the reported incidents of murder.<sup>93</sup> At the end of the 2015/2016 year of reporting, the South African Police Service finally recognised gang-related offences as a priority crime-type and reported it individually in its yearly reports. The Report did however acknowledge that the “motive or causative factors” of only 59,3% of analysed

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<sup>87</sup> Kinnes *Criminal Empires* ix.

<sup>88</sup> The reliability and accuracy of these figures have however been doubted. See Standing *Cape Flats* 37-38.

<sup>89</sup> Standing *Cape Flats* 38.

<sup>90</sup> See Standing *Cape Flats* 103; D Pinnock *Gang Town* (2016) 98-100.

<sup>91</sup> L Camerer, A Louw, M Shaw, L Artz & W Scharf “Crime in Cape Town: Results of a City Victim Survey” (04-1998) ISS <<https://oldsite.issafrica.org/uploads/Mono23Full.pdf>> (accseed 01-12-2017) 52-53.

<sup>92</sup> Statistics South Africa *Crime Statistics Series Volume III: Exploration of selected contact crimes in South Africa (In-depth analysis of Victims of Crime Survey Data)* 2011-2014/15 (2016) 68.

<sup>93</sup> Statistics South Africa *Crime Statistics Series Volume III* 69.

cases of murders have been clearly established.<sup>94</sup> An astonishing 13,4% of those murders in the Western Cape were gang-related. This was also the second-highest national contributor to murders (2,1%) due to “group behaviour” – second only to incidents of mob justice or vigilantism.<sup>95</sup> In 2014 it was reported that gangs have previously contributed 18% of the provincial murder rate.<sup>96</sup> The most recent statistics from the 2017/2018 financial year painted an increasingly worrisome picture with 21,6% of the provincial murder rate being attributed to gangs.<sup>97</sup>

The Prevention of Organised Crime Act 121 of 1998 (“POCA”) has seemingly made no significant impact on the criminal justice system. Reports of low conviction rates of Cape Town gangs have started to surface – especially since 2015. In 2017 it was reported that only 3% of the 1 886 gang-related murders that occurred over the past five years in Cape Town led to successful prosecutions.<sup>98</sup> Claims about a dismal conviction rate in the media caused tension within the provincial government. For instance, the Premier of the Western Cape, Helen Zille, criticised the criminal justice system for an alleged conviction rate of only 0,7% in Mitchell’s Plain.<sup>99</sup> The National Prosecuting Authority (“NPA”), the provincial Department of Community

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<sup>94</sup> South African Police Service *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report* (2016) 11-13. The 59,3% amounted to 1 727 murders out of a total of a sample of 2 2912 incidents. The total number of reported numbers however amounted to 18 673. The sample thus only represented 15,6% of the reported incidents. The 2015/2016 murder rate continued an upward trend started in 2012/2013 and has come close to the highest recorded rate during the 2006/2007 period (19 106).

<sup>95</sup> South African Police Service *Crime Report 2015/2016* (2016) 14-15. Gang-related murders in the Eastern Cape made up 3,1% of the analysed incidents. The 2015/2016 year may have shown particular increase in group or mass action in part to the #FeesMustFall campaign. See *Crime Report* (2016) 50.

<sup>96</sup> I Kinnes “Gangs, drugs and policing the Cape Flats” (2014) 2 *Acta Criminologica* 14 17.

<sup>97</sup> The amount of gang-related murders amounted to 808 while the total amount of persons murdered in the province (where the motive could be determined) amounted to 3 729 – South African Police Service “Crime Situation in RSA Twelve Months 01 April 2017 to 31 March 2018” (11-09-2018) *South African Police Service* <[https://www.saps.gov.za/services/long\\_version\\_presentation\\_april\\_to\\_march\\_2017\\_2018.pdf](https://www.saps.gov.za/services/long_version_presentation_april_to_march_2017_2018.pdf)> (date accessed 26 October 2018) (pages 17 and 24). Compare with the 2016/2017 rate of 19,3% – see South African Police Service “SAPS Crimestats” (24-10-2017) *South African Police Service* <<https://www.saps.gov.za/services/crimestats.php>> (accessed 01-11-2017).

<sup>98</sup> S Sesant “Gang guilty verdicts at 3%” (28-03-2017) *IOL* <<http://www.iol.co.za/news/crime-courts/gang-guilty-verdicts-at-3-8378062>> (date accessed 24-06-2017). Cf D Adriaanse “Where did Zille get stats for gang convictions?” (07-06-2016) *IOL* <<http://www.iol.co.za/news/crime-courts/where-did-zille-get-stats-for-gang-convictions-2031652>> (date accessed 24-06-2017).

<sup>99</sup> D Adriaanse “Where did Zille get stats for gang convictions?” *IOL*.

Safety as well the national Department of Justice and Constitutional Development all subsequently denied these claims. The Provincial Head (Western Cape) of the Department of Justice and Constitutional Development (“DJCD”), Hishaam Mohamed, intimated that the statistics are not readily ascertainable. The reason for this is “that there was no offence described as “gang-related” [and thus] made it extremely difficult to establish which offences were considered”.<sup>100</sup> Mr Mohamed submitted that there was rather an 85% conviction rate between the 1<sup>st</sup> of April 2015 and the 31<sup>st</sup> of March 2016 – and 133 out of 156 cases had reached a verdict. Furthermore, 65 of the cases that reached a verdict were gang-related.<sup>101</sup> These statements could be construed as somewhat misleading. There is no indication *how many* of those 65 cases reached a *conviction*. It is merely stated that a verdict was reached in those cases. There is also no indication as to how many cases could not even reach the trial stage.

The Western Cape provincial government, partially due to the ineffectual legislative efforts by the National Government and unsuccessful gang-fighting strategies, decided to implement additional measures earlier in this decade to combat this growing phenomenon. The Western Cape Minister of Community Safety has however voiced his disappointment in the four-pronged approach adopted by the Province. The approach, aimed to work in synergy, consisted of intelligence management; project-driven gang investigation; community mobilisation and strategic deployment of police officers in order to create visible policing in gang-affected areas.<sup>102</sup> The Minister also voiced his concern about the yearly increase (during the 2013-2014 period) of gang-associated crimes like murder and drug-related offences.<sup>103</sup> A further complication to this matrix is the fact that 85% of police stations are understaffed which further

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<sup>100</sup> D Adriaanse “Where did Zille get stats for gang convictions?” *IOL*. The meaning of this statement is however unclear. Section 9 of POCA is labelled as “gang-related offences” and it is doubted that the Provincial Head of the DJCD was suggesting that no such crime exists. More likely it means that that phrase, used in a generic fashion and not in its strict legal context, appears nowhere in the analysed cases, which is likely due to the underutilisation of POCA.

<sup>101</sup> D Adriaanse “Where did Zille get stats for gang convictions?” *IOL*.

<sup>102</sup> D Plato “MEC Dan Plato: Briefing on provincial policing needs and priorities” (14-04-2015) Western Cape Government <<https://www.westerncape.gov.za/news/police%E2%80%99s-gang-strategy-not-stopping-scourge-gang-and-drug-related-crimes>> (accessed 21-04-2015).

<sup>103</sup> Plato “MEC Dan Plato: Briefing on provincial policing needs and priorities” Western Cape Government.



complicates the policing of criminal gang activities.<sup>104</sup> The Premier of the Western Cape, in 2013, additionally released a joint-statement with the executive mayor of

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<sup>104</sup> Plato “MEC Dan Plato: Briefing on provincial policing needs and priorities” Western Cape Government. See also JM Pienaar, W Du Plessis & NJJ Olivier “Onrus en Geweld: 2014 (2)” (2014) 29 *Southern African Public Law* 566 566 where the authors describe the factors contributing to the crime problem in South Africa, *inter alia* the understaffed police stations. There also seems to be a significant lower graduate level at the SAPS academy, amounting to “a more than 50% aggregate drop in trained officer output compared to the two financial years before that”. See DA “50% decline in Police Academy graduates is shrinking already under-staffed SAPS” (16-05-2016) DA <<https://www.da.org.za/2016/05/50-decline-in-police-academy-graduates-is-shrinking-already-under-staffed-saps/>> (accessed 21-03-2017). This issue was highlighted by the Khayelitsha Commission – Khayelitsha Commission *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (2014) (see for example page 246). Gross inequities in police distribution were quite glaring. Evidence was submitted to the Commission that Harare had a ratio of 634,5 residents per SAPS member; Khayelitsha Site B had 688,05 persons to SAPS member and Lingeletu West had 275,03 per SAPS member. These areas are poorer in the socio-economic context and the first two areas also have a gang presence. Other areas in Cape Town, which have a stronger economic population and have lower crime rates, have disproportionately highly staffed police stations. Stellenbosch had 140,54 persons per SAPS member; Claremont 130,79 per SAPS member and Sea Point 118,76 per SAPS member. On page 394 the Commission notes that

One of the questions that has most troubled the Commission is how a system of human resource allocation that appears to be systematically biased against poor black communities could have survived twenty years into our post-apartheid democracy.

And further on page 449 that

[t]his research suggests that the residents of the poorest areas of Cape Town that bore the brunt of apartheid are still woefully under-policed twenty years into our new democracy and are often the police stations with the highest levels of serious contact crime. This pattern needs to change as a matter of urgency.



Cape Town, setting out radical plans to address the phenomenon in the province.<sup>105</sup> This rededication to the anti-gang fight was prompted by an outbreak of gang violence that year around the gang-plagued Manenberg area. This outbreak was partially due to the release of several prominent gang leaders from prison.<sup>106</sup> It is clear from the statement that the local, provincial and national governments are left powerless in both the investigation and conviction of crimes and can merely fulfil a supervisory

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The Khayelitsha Commission also stated that Nyanga, which is also a gang hotspot, is one of the most understaffed police stations in the Western Cape (see page 449). In fact, the Social Justice Coalition (which is one of the complainant organisations that advocated for the establishment of the Commission) also pointed out that at the time of the findings of the Commission, that it was *the* most understaffed police station in the Western Cape and has the highest murder rate in the Western Cape as well as in the country – see Social Justice Coalition “Commission of Inquiry” *Social Justice Coalition* <[http://www.sjc.org.za/commission\\_of\\_enquiry](http://www.sjc.org.za/commission_of_enquiry)> (accessed 01-12-2017). The 2017 crime statistics also reveal that Nyanga is still the murder capital of the Western Cape (see South African Police Service “SAPS Crimestats” (24-10-2017) South African Police Service <<https://www.saps.gov.za/services/crimestats.php>> (accessed 01-11-2017). The Social Justice Coalition and Equal Education also made an application to the Equality Court citing unfair discrimination based on race and poverty by the Minister of Police, National Commissioner of Police, the Western Cape Police Commissioner as well as the Western Cape Minister for Community Safety. The Notice of Motion is available at <[https://d3n8a8pro7vnm.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1485184706/Notice\\_of\\_Motion\\_-\\_Equality\\_Court.pdf?1485184706](https://d3n8a8pro7vnm.cloudfront.net/socialjusticecoalition/pages/225/attachments/original/1485184706/Notice_of_Motion_-_Equality_Court.pdf?1485184706)>.

See also C Booysen “Victims of gang violence have little to celebrate on #FreedomDay” (28-04-2017) *IOL* <<http://www.iol.co.za/news/politics/victims-of-gang-violence-have-little-to-celebrate-on-freedomday-8850049>> (accessed 05-08-2017) where the chairperson of the Manenberg Safety Forum stated that “[t]oday we have hundreds of police protecting us but we never have that in our communities. We demand our right to be protected and to be safe in our communities”. She however did admit that police officers are also slain due to gang members (see Booysen “March because gang violence victims ‘are not free’” *IOL*).

<sup>105</sup> H Zille & P De Lille “Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille” (13-08-2013) South African Government <<http://www.gov.za/gang-violence-western-cape-government-and-city-cape-towns-interventions-joint-statement-western-cape>> (accessed 21-04-2015).

<sup>106</sup> Zille & De Lille “Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille” South African Government.

function.<sup>107</sup> This supervisory function could however not be executed efficiently due to the alleged unwillingness of the previous Minister of the Police, Nathi Mthethwa, to cooperate with the Western Cape Government.<sup>108</sup> The statement furthermore highlighted five interventions that addressed gang violence specifically. The most significant proposal calls for the re-establishment of the specialised gang and drug units which was disbanded by former police commissioner Jackie Selebi.<sup>109</sup> It was alleged that these units were disbanded in order to protect gang leaders.<sup>110</sup> Since the disbandment in 2004, there has been a sharp rise in drug-related crimes – which are often associated with gangs and often form the crux of their criminal operations.<sup>111</sup> In fact, the Western Cape experienced a 181% increase in these crimes from the 2003/2004 period to the 2011/2012 period.<sup>112</sup> Shockingly, it was also reported that 40% of the crimes committed in the Western Cape that year occurred within six areas

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<sup>107</sup> In terms of section 206 of the Constitution, which confers powers to the local and provincial government. Especially of significance are sections 206(3)(a) and (b) which states that that provinces are entitled to monitor police conduct; “oversee the effectiveness and efficiency of the police service, including receiving reports on the police service”.

<sup>108</sup> H Zille & De Lille “Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille” South African Government.

<sup>109</sup> On 8 October 2018, a new 95-member Anti-Gang Unit was launched by SAPS. The operational area is within the Nyanga cluster, Bishop Lavis and Bonteheuwel. See L Daniel “Cape Flats gets new anti-gang unit thanks to national police ministry” (01-11-2018) *The South African* <<https://www.thesouthafrican.com/cape-flats-gang-unit-national-government/>> (accessed 02-11-2018); *EWN* “Cele Hails Success of Cape's New Anti-Gang Unit” (15-11-2018) *Eyewitness News* <<https://ewn.co.za/2018/11/14/cele-hails-success-of-cape-s-new-anti-gang-unit>> (accessed 15-11-2018).

<sup>110</sup> Zille & De Lille “Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille” South African Government.

<sup>111</sup> M Wijnberg *Exploration of Male Gang Members' Perspectives of Gangs And Drugs* MA (Social Work) thesis University of Stellenbosch (2012) 67-79 (especially) where the author discusses the relationship between gangs and drug use. Also see Department of Community Safety Provincial Policing Needs and Priorities (PNP) Report for the Western Cape 2015/16 (2016) where it was reported that the police stations that reported the most drug-related offences were also those that were greatly affected by gang activity.

<sup>112</sup> D Kohler Barnard “DA Challenges Minister To Re-establish Anti-drug And Gang Units” (18-06-2013) *DA* <<http://www.da.org.za/2013/06/da-challenges-minister-to-re-establish-anti-drug-and-gang-units/>> (accessed 21-04-2015).

of Cape Town – areas that are all known for its gang presence.<sup>113</sup> Mitchell's Plain in Cape Town is also known for a substantial gang presence and a staggering number of 25 575 crimes were reported at the Mitchell's Plain police office during the 2013/2014 period – the highest rate in the country.<sup>114</sup>

There have also been suggestions of interventions by the South African National Defence Force ("SANDF") to "stabilise gang hotspot areas" – thereby giving SAPS the liberty to investigate and arrest offenders in these areas. The request was denied, allegedly because the SAPS was deemed to have the capacity to deal with this matter efficiently.<sup>115</sup> This determination was probably misdirected, considering that the ratio of citizens to officers is three times bigger than the provincial average.<sup>116</sup> The Western Cape Department of Community Safety has also referenced understaffed police stations as a priority problem provincially, and this is also an issue in numerous police stations.<sup>117</sup> Commentators like Kinnes are opposed to the deployment of the SANDF to fight gangs. The author correctly argues that the SANDF is trained to engage in situations of war and not to stabilise civilian criminal problems like criminal gang situations. He also doubts whether the SANDF will be able to identify gang members because not even the police seem to be able to distinguish them from the general public.<sup>118</sup> The deployment of the Tactical Response Team in Manenberg has also

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<sup>113</sup> JM Pienaar, W Du Plessis & NJJ Olivier "Onrus en Geweld: 2014 (1)" (2014) 29 *Southern African Public Law* 207 208. These areas are Philippi East, Gugulethu, Harare, Khayelitsha, Lingeletu West and Nyanga.

<sup>114</sup> Pienaar, Du Plessis & Olivier (2014) *Southern African Public Law* 566.

<sup>115</sup> Zille & De Lille "Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille" *South African Government*. It is pointed out in the statement that there were 115 murders in Manenberg which had a shocking conviction rate of only 25%. This clearly illustrates an institutional failure (at least in part) by the SAPS.

<sup>116</sup> Zille & De Lille "Gang violence: Western Cape Government and City of Cape Town's interventions: Joint Statement by Western Cape Premier Helen Zille and Executive Mayor of the City of Cape Town, Alderman Patricia De Lille" *South African Government*. It is pointed out in the statement that there were 115 murders in Manenberg but had a shocking conviction rate of only 25%. This clearly illustrates an institutional failure (at least particularly) by the SAPS. See Pienaar, Du Plessis & Olivier (2014) *Southern African Public Law* 566.

<sup>117</sup> See Department of Community Safety *Provincial Policing Needs and Priorities (PNP) Report for the Western Cape 2015/16* (2016) 79.

<sup>118</sup> Kinnes (2014) *Acta Criminologica* 23.

increased the disdain of the community towards the police.<sup>119</sup> There has been a deployment of the SANDF in 2015 as part of Operation Field-reclaim.<sup>120</sup> This operation, though not focused on specifically addressing criminal *gang* activities, has seen the implementation of a multi-agency approach with the ambitious goal of “eliminating criminality and general lawlessness”.<sup>121</sup> Government agencies, including the Department of Home Affairs (with immigration services), the Department of Community, SARS, border police, public order police, cluster police, and the second hand goods component of the police were participating.<sup>122</sup> The SANDF was only involved from late April until the end of June.<sup>123</sup> The operation also faced harsh censure due to its disproportionate effect on illegal immigrants and the appearances of “state-sponsored xenophobia”.<sup>124</sup>

The social impact of gangs on communities in the Western Cape is also undeniable. Kinnes points towards the closing of government services due to gang activities,

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<sup>119</sup> Kinnes (2014) *Acta Criminologica* 23.

<sup>120</sup> Parliament of South Africa “Parliament on results of Operation Fiela” (15-05-2017) *South African Government* <<http://www.gov.za/speeches/results-operation-fiela-reclaim-noted-15-may-2015-0000>> (accessed 06-08-2017).

<sup>121</sup> Parliament of South Africa “Operation Fiela” (2015) *South African Government* <<http://www.gov.za/operation-fiela>> (accessed 06-08-2017).

<sup>122</sup> Parliament of South Africa “Operation Fiela” (2015) *South African Government*.

<sup>123</sup> Africa News Agency “SANDF are no longer part of Operation Fiela – Mapisa-Nqakula” (07-09-2015) *eNCA* <<http://www.enca.com/south-africa/sandf-are-no-longer-part-operation-fiela-%E2%80%93-mapisa-nqakula>> (accessed 06-08-2017).

<sup>124</sup> Africa News Agency “SANDF are no longer part of Operation Fiela – Mapisa-Nqakula” *eNCA*.

including the closing of schools,<sup>125</sup> health service providers<sup>126</sup> and transport services.<sup>127</sup> This offends constitutional rights, such as the right to education,<sup>128</sup> right to access to health care,<sup>129</sup> children's rights<sup>130</sup> as well as the right to freedom from violence.<sup>131</sup> It has previously been indicated that 61,6% of 22 schools in areas prevalent with gang activities, were affected.<sup>132</sup> During a five-month period in 2016 alone, 99 incidents of gang violence, shootings and presence on school grounds were reported to the Safe Schools call centre leading up to 63% student absenteeism in the Manenberg area alone. Students there and in other affected areas have to resort to

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<sup>125</sup> See P Saal "Schools reopen after bullets fly in gang turf wars" (01-06-2017) *TimesLive* <<https://www.timeslive.co.za/news/south-africa/2017-06-01-schools-reopen-after-bullets-fly-in-gang-turf-wars/>> (accessed 24-06-2017). Here, turf wars in Lavender Hill caused four schools to close and two teachers suffered mild strokes due to the stress from the ongoing violence. Only about 50% of the learners returned to the school after they reopened. Also see M Charles "At least 15 killed in ongoing #BishopLavis gang violence" (01-08-2017) *IOL* <<http://www.iol.co.za/capeargus/at-least-15-killed-in-ongoing-bishoplavis-gang-violence-10583599>> (accessed 06-08-2017) where, as the title suggests, fifteen people were killed in an outbreak of gang violence in Bishop Lavis. Among those victims were two school learners who had died in the crossfire.

<sup>126</sup> See also P Saal "Cape Flats clinic to reopen after two staff members were caught in gang wars" (02-06-2017) *TimesLive* <<https://www.timeslive.co.za/news/south-africa/2017-06-02-cape-flats-clinic-to-reopen-after-two-staff-members-were-caught-in-gang-wars/>> (accessed 24-06-2017). "Gang wars" in Lavender Hill led to the temporary closure of clinic and relocation of patients after two of the employees of the clinic were wounded in the crossfire.

<sup>127</sup> Kinnes (2014) *Acta Criminologica* 16.

<sup>128</sup> In terms of section 29 of the Constitution. This is especially an infringement of section 29(1) which guarantees *everyone* the right to a basic education.

<sup>129</sup> In terms of section 27(1)(a).

<sup>130</sup> Section 28(1)(c) promises the right to, *inter alia*, basic health care and social services.

<sup>131</sup> Section 12(1)(c) of the Constitution. This section is also discussed below in Chapter 7. Also C Booysen "March because gang violence victims 'are not free'" *IOL*. The chairperson of the Manenberg Safety Forum stated that the community is effectively being "held hostage by gangsters" and highlighted the impact on their community, including the death of children (especially through gunfire), the rape of women as well as the death of police officers in the line of duty.

<sup>132</sup> Western Cape Government *Integrated Provincial Violence Prevention Policy Framework* (2013) 12. Also see Anonymous "Gang wars force pupils to move to safe exam location" (23-06-2017) *IOL* <<http://www.iol.co.za/news/south-africa/western-cape/gang-wars-force-pupils-to-move-to-safe-exam-location-9934630>> (accessed 24-06-2017). It was indicated in the article that students feel traumatised by hearing gunshots during school hours. They are also conflicted due the fact that schools criticised gangsterism violence, but it is a normal way of life at home.

hiding weapons as “protection from rival gangs”.<sup>133</sup> The omnipresence of gangs leads to the eventual normalisation of gangsterism and gang violence in the affected areas. Children also often join gangs and “mimic the violence”.<sup>134</sup> Children also join gangs purely out of self-preservation.<sup>135</sup> They face the impossible choice of either joining a gang in order to receive protection and “immunity” from that gang or not join a gang and remain vulnerable to all threats. Schools are used as market places for the sale of drugs<sup>136</sup> and girls may fall victim to human trafficking.<sup>137</sup> There seems, despite these tragedies, a lack of political willpower to remedy the situation.<sup>138</sup>

## 2.3 An overview of the development of criminal gangs in South Africa (in particular the Cape Flats)

The evolution of the criminal gang phenomenon in South Africa must be described in the context of the transformation of the nature of organised crime in general. This transformation, according to Standing, can mainly be ascribed to three broad factors.<sup>139</sup> Firstly, during the transitional phase of South Africa after the democratisation in 1994, there was a weakening of the previous regime’s “police state”.<sup>140</sup> There was a shift under the new constitutional regime, where the power of the police was restricted and there was strong focus on human rights and due process. The vast and virtually unrestricted powers of the apartheid state’s security apparatus

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<sup>133</sup> I Fredericks “Gang war hits Cape schools hard” (06-06-2016) *IOL* <<http://www.iol.co.za/news/crime-courts/gang-war-hits-cape-schools-hard-2030999>> (accessed 06-08-2017). Also see S Fisher “Learner Dies After Being Stabbed at Kraaifontein School” (14-06-2017) *Eyewitness News* <<http://ewn.co.za/2017/06/14/grade-8-learner-stabbed-to-death-at-kraaifontein-school>> (accessed 06-08-2017) where a student was died after an apparent gang-related stabbing by a fellow-pupil in a school in Kraaifontein.

<sup>134</sup> Anonymous “Gang wars force pupils to move to safe exam location” *IOL*.

<sup>135</sup> Anonymous “Gang wars force pupils to move to safe exam location” *IOL*.

<sup>136</sup> See Department of Community Safety *Provincial Policing Needs and Priorities (PNP) Report for the Western Cape 2015/16* (2016) 55.

<sup>137</sup> A Standing “The threat of gangs and anti-gangs policy: Policy discussion paper” (2005) Paper 116 *Institute for Security Studies* 13.

<sup>138</sup> See J Jansen “The Big Read: The kids who dodge bullets” (01-06-2017) <<https://www.timeslive.co.za/ideas/2017-06-01-the-big-read-the-kids-who-dodge-bullets/>> *TimesLive* (accessed 24 June 2017). Here, Professor Jonathan Jansen writes critically on the lack of political willpower to tackle the gang crisis in the Cape Flats.

<sup>139</sup> Standing Cape Flats 38.

<sup>140</sup> Standing Cape Flats 38-39.



(including the police) were greatly curtailed by the constitutional and legislative transformation of the post-apartheid era. This also required the retraining of police officers.<sup>141</sup> Various criminal groups (including foreign groups) took advantage of the perceived new lenient policing mechanisms by the new SAPS. The period of political transition thus afforded criminal groups the opportunity to flourish.<sup>142</sup>

This leads to the second contributing factor, namely the proliferation of criminal groups owing to the weakening of the state borders. South Africa was greatly isolated from the international community during the apartheid-era but after the reopening of the borders, various criminal influences from across the African continent (significantly Nigeria) were able to make their way to South Africa.<sup>143</sup> Local gangs, for the first time since the closing of the trade borders under the apartheid regime, now had the opportunity to cooperate with transnational<sup>144</sup> syndicates to grow their criminal

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<sup>141</sup> Standing *Cape Flats* 38-39. The transition can also be described, as famously stated by Etienne Mureinik, as a transition between a culture of authority to a culture of justification. He says

If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification - a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.

E Mureinik "A bridge to where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal of Human Rights* 31 33. Also see D Dyzenhaus "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 *South African Journal of Human Rights* 11.

<sup>142</sup> Standing *Cape Flats* 38-39. Also see Cowling (1998) *South African Journal of Criminal Justice* 351-352.

<sup>143</sup> Standing *Cape Flats* 38-39. Also see See P Gastrow "Organised Crime in South Africa: An Assessment of its Nature and Origins" (08-1998) /ISS <<https://issafrica.s3.amazonaws.com/site/uploads/Mono28.pdf>> (accessed 14-11-2016). There was also the influence (as the author calls it) "fortune seekers" during the 1980s from countries such as Britain, Portugal and France forged relationships in African countries (such as Zambia, Zaire and Zimbabwe). The author points out that the so-called white fortune seekers could more easily smuggle the goods illicit goods (such as Mandrax, diamonds and precious metals) into the country than smugglers from African countries due to the harsh border control during Apartheid. This problem was however alleviated for the African smugglers after the fall of the Apartheid State.

<sup>144</sup> The Palermo Convention classifies a crime as transnational in article 2 when

- (a) It is committed in more than one State;
- (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

markets.<sup>145</sup> Foreign syndicates also identified South Africa as a breeding ground for their criminal activities, due to the sophisticated infrastructure (including banking, transport and telecommunication).<sup>146</sup> The foreign influence – which stretches beyond the African continent and includes Russian, American and Chinese criminal groups – introduced their criminal networks to local gangs and consequently elevated their level of structural and criminal organisation.<sup>147</sup> Relatively rudimentary criminal endeavours morphed into sophisticated, organised criminal operations. During the 1980s, local gangs like the Hard Livings, used to, amongst other things, gamble and extort businesses within their local communities. Post-democratisation their operations began to stretch their tentacles outside of their base in Manenberg and they became involved in, for example, the sex industry. Their influence and income grew to the extent where they could invest the proceeds of the illicit income back into their communities during the 1990s.<sup>148</sup> In reaction to certain syndicates encroaching on their territories, larger gangs, that mainly operate on the streets, began to adopt the hierarchal structure including a strict chain of command, language and code of conduct to organise their members, expand their network as well as “control their customers”.<sup>149</sup>

The main consensus surrounding the reasons behind the flourishing of gang activities in the Cape Flats is centred on the displacement of families due to the impact of the Group Areas Act 41 of 1950 (“the Act”). The Act made possible the displacement

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(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

<sup>145</sup> See Kinnes (2000) *ISS* 10. See generally on the proliferation of criminal groups and their infiltration into global markets E Mylonaki “The manipulation of organised crime by terrorists: Legal and factual perspectives” (2002) 2 *ICLR* 213 213.

<sup>146</sup> Standing *Cape Flats* 38-39. Also see M Cowling “Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998” (1998) 11 *South African Journal of Criminal Justice* 350 351-352.

<sup>147</sup> Standing *Cape Flats* 38-39 (where the author relies on B Haefele “Gangsterism in the Western Cape” in Anon. *Criminal economy, gangs and child abuse in the Western Cape Town* (2003) 31.

<sup>148</sup> See Kinnes (2000) *ISS* 10.

<sup>149</sup> Pinnock *Gang Town* 105. Pinnock points out by 2000, syndicates have predominantly become suppliers of gangs, and gangs at that stage controlled about 90% of the dagga, madrax and cocaine markets.



of approximately 700 000 Coloured and African Families from the homes in the inner-city of Cape Town over a period of 32 years (1950-1982).<sup>150</sup> This displacement to the Cape Flats disrupted the social cohesion and a level of informal social control that communities and extended families had over each other.<sup>151</sup> Although small gangs were in existence in areas such as District Six (an area adjacent to Cape Town CBD), they appeared to still be subject to the informal social control.<sup>152</sup> These criminal youth groups developed due to increasing overcrowding impacting on living conditions.<sup>153</sup> The overcrowding in the affected areas limited income opportunities in the informal markets such as hawking, prostitution and *shebeens* which necessitated engagement in criminal activities in order to survive and demarcate territory.<sup>154</sup> These groups were mainly dealt with without resorting to imprisonment and were generally regarded more of a nuisance than a serious criminal threat. They were issued fines by the police and were directed to farms to labour while “under sentence”.<sup>155</sup> This situation remained relatively stable leading up to the harsh implementation of the Group Areas Act, referred to above.<sup>156</sup>

Pinnock notes that the character of these groups began to transform during the 1940s. Previously predominantly benign groups of youths transformed into organised criminal groups, which coincided with the increase in illegal gambling and *shebeens*. Crimes committed by the gangs became violent and boys were often necessitated to join due to self-preservation.<sup>157</sup> This transformation evoked reaction both from the State as well as the community. The State intervened with a Special Squad with wide powers in 1946. This squad however made the most of their wide powers and seemingly believed in guilt by association. Part of the *modus operandi* was to also arrest family members of the alleged gang members.<sup>158</sup>

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<sup>150</sup> BE Van Wyk & WH Theron “Fighting gangsterism in South Africa: a contextual review of gang and anti-gang movements in the Western Cape” (2005) 18(3) *Acta Criminologica* 51-53.

<sup>151</sup> Pinnock *Gang Town* (2016) 17-18.

<sup>152</sup> TR Samara *Cape Town After Apartheid: Crime and Governance in the Divided City* (2011) 93-94.

<sup>153</sup> See Van Wyk & Theron (2005) *Acta Criminologica* 53.

<sup>154</sup> Samara *Cape Town After Apartheid* 93; Pinnock *Gang Town* 18-19.

<sup>155</sup> Pinnock *Gang Town* 18-19.

<sup>156</sup> Pinnock *Gang Town* 18-19.

<sup>157</sup> Pinnock *Gang Town* 19-20.

<sup>158</sup> Pinnock *Gang Town* 20.

During the 1950s, a group called the Globe emerged. This group seemed to first have the intention of protecting the community against criminal gang activities but later, ironically, transformed into a sophisticated criminal gang itself selling marijuana, as well participating in smuggling and gambling operations.<sup>159</sup>

Van Wyk and Theron describe the Struggle Period in South Africa as a period of “demise” for gangs (as well as anti-gang movements).<sup>160</sup> So-called “defence” gangs were formed. Youth members grouped together to shield themselves from falling victim to gang activities. Older men also grouped together to form the “Peacemakers”. These self-protection mechanisms by communities (which was necessitated by the seeming disinterest by the provincial administration in the gang problem) were however thwarted due to the Riotous Assemblies Act 17 of 1956 (“RAA”). The RAA prohibited the gathering of non-white persons to prevent political dissention.<sup>161</sup> From around the 1960s towards the end of the 1970s (particularly 1976) a significant number of non-white inhabitants of the country were involved in the collective struggle against the apartheid regime.<sup>162</sup> Cross points out that gang members were employed in the political movement and “brought with them some of the anarchy, self-assertion, and spirit of defiance of the streets”.<sup>163</sup> Street violence seemed to have been re-focused towards the governmental oppression.<sup>164</sup>

There was a resurgence of criminal gangs towards the end of the struggle period and inception of the democratic dispensation (1986-1996).<sup>165</sup> Gangs and potential gang members were no longer required in the liberation struggle. This was because the final phases of the liberation struggle were done predominantly through (peaceful) negotiations.<sup>166</sup> This once again enticed people to join and re-focus their collective strategies to criminal activities.

The transition to a democratic society towards the mid-1990s also did not provide job opportunities as expected by many communities, including those affected by

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<sup>159</sup> Pinnock *Gang Town* 20-27.

<sup>160</sup> Van Wyk & Theron (2005) *Acta Criminologica* 53.

<sup>161</sup> Van Wyk & Theron (2005) *Acta Criminologica* 54.

<sup>162</sup> M Cross “Youth, Culture, and Politics in South African Education: The Past, Present, and Future” (1993) 24(4) *Youth & Society* 377 386; Van Wyk & Theron (2005) *Acta Criminologica* 54.

<sup>163</sup> Cross (1993) *Youth & Society* 385.

<sup>164</sup> See Cross (1993) *Youth & Society* 387-388.

<sup>165</sup> Van Wyk & Theron (2005) *Acta Criminologica* 54.

<sup>166</sup> Van Wyk & Theron (2005) *Acta Criminologica* 54.

gangs. Once again, just as with the first manifestations of gangs, modern era gangs were stimulated due to a lack of financial opportunities.<sup>167</sup> As described above, the democratic and constitutional dispensation brought about a severe limitation on the powers of the so-called police state. The control which the State *could* previously exercise over gang areas were thus restricted to the extent where gangs were given the opportunity to flourish under the new political dispensation<sup>168</sup> with its greater focus on human rights and due process.

Gangs emerged as a prominent threat against the young South African democracy, especially towards the end of the 1990s. Vigilante group, PAGAD (People Against Gangsterism and Drugs), created a war-like atmosphere in the Cape Flats and brought about the apex of the 1990s gang war, which was characterised by a tense and fearful atmosphere to not only those living in the Cape Flats but also the greater Cape Town area.<sup>169</sup> The aim of PAGAD was to eradicate gang activities in the affected areas which often resulted in violent home invasions.<sup>170</sup> Their activities were however not only limited to gang members but the so-called gang war also involved clashes with the police and claimed the lives of dozens of non-gang members of the public.<sup>171</sup>

Gangs started to change tactic. The high-profile killing of a suspected drug dealer leader by PAGAD appeared to have frighten gang members and leaders into operating more covertly.<sup>172</sup> The PAGAD gang war (at least partially) and the increased gang presence in the 1990s prompted the Government to react with the enactment of POCA.<sup>173</sup>

The “post-PAGAD” and post-POCA era has been marked by a new tumultuous period with several particularly violent outbreaks of gang violence which have occurred with depressing regularity, specifically in 1996, 1998, 2002, 2006, 2011 and 2013.<sup>174</sup> Kinnes posits that the spikes in gang violence are associated with periods of political

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<sup>167</sup> See Kinnes (2000) *ISS* 10-11.

<sup>168</sup> Van Wyk & Theron (2005) *Acta Criminologica* 54.

<sup>169</sup> See Standing *Cape Flats* 43.

<sup>170</sup> Van Wyk & Theron (2005) *Acta Criminologica* 53.

<sup>171</sup> See Standing *Cape Flats* 43; Van Wyk & Theron (2005) *Acta Criminologica* 53.

<sup>172</sup> Standing *Cape Flats* 43; See Kinnes (2000) *ISS* 10-11.

<sup>173</sup> Standing *Cape Flats* 43.

<sup>174</sup> Kinnes (2014) *Acta Criminologica* 17. There was also a violent outbreak in 1993 but does not fall within this category.

and social strife and occur mostly in periods just after school holidays.<sup>175</sup> The ensuing gang wars are also lasting significantly longer. Previously (between the 1970s and the 1990s), inter-gang conflicts would last a few days and at most a few weeks. Several of the inter-gang conflicts, especially after 2010, have lasted in some instances between six and eight months.<sup>176</sup> Such conflicts are difficult for SAPS to control and must also be understood in the context of approximately 85% of police stations being understaffed and ill-equipped to deal with quasi-war situations. These conflicts mainly appear to revolve around the expansion or control of drug territories.<sup>177</sup> The retention and expansion of drug territories is extremely important to criminal gangs (especially marijuana, cocaine and mandrax), as proceeds from drugs often constitute their main source of income. Consequently, innocent members of the public are terrorised by inter-gang wars and are often fatally wounded.<sup>178</sup>

From the discussion above, one notices that gangs have taken on several manifestations throughout the decades. The basic evolutionary forms include a means of basic survival and camaraderie; comrades in the freedom struggle; members of sophisticated crime syndicates; and perpetrators of domestic warfare. This, once again, underscores the complexities of dealing with organised crime in general and criminal gang activities in particular. Neither social nor legislative interventions have made a significant impact on the gang problem in the Western Cape. Gang-related crimes seem to have *increased* along with an intensification of legislative and social strategies. It remains to be seen whether a programme such as the National Anti-Gang Strategy that aims to work holistically rather than addressing gang convictions or providing social programmes in isolation, will live up to its promise.

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<sup>175</sup> Kinnes (2014) *Acta Criminologica* 17.

<sup>176</sup> Kinnes (2014) *Acta Criminologica* 17.

<sup>177</sup> See South African Police Service Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report (2016) 80.

<sup>178</sup> See A Standing "The threat of gangs and anti-gangs policy: Policy discussion paper" (2005) Paper 116 *Institute for Security Studies* 1 2.

## 2 4 The rationale for the criminalisation of gangs

### 2 4 1 *Introduction*

It is at this point that two *broad* questions must be posed. Firstly, what is the rationale for criminalising criminal gang activities when there are already existing common law and statutory mechanisms available to address criminal conduct associated with criminal gangs? And, secondly, whether sanctions through criminal law are in fact the appropriate response to the phenomenon of criminal gangs.<sup>179</sup>

### 2 4 2 *The criminalisation of an existing wrong*

Modern societies have tended to attach criminal sanctions to four categories of factors or considerations, namely public morality, the preservation of the state, the protection of human interests, and the promotion of public welfare.<sup>180</sup> Two of these interests stand out in the context of criminal gang activities: protection of human interests and the promotion of public welfare. The discussion above details the human interests that criminal gang activities endanger.<sup>181</sup> Chapter 5 below will also provide an exposition of the relevant constitutional interests, namely fair trial rights of the accused on the one hand and the public's right to be free from violence on the other hand.<sup>182</sup> The protection of human rights (especially bodily integrity) in the broader context of human interests however does not explain why the participation in criminal gang activities should receive separate criminalisation while the underlying crimes are all already criminal acts. In other words, the rationale for separate criminalisation should therefore transcend the mere underlying criminal activities that criminal gangs engage in. The same argument holds for the promotion of public welfare. Whether acts of violence are, for example, perpetrated by a gang, or whether those same acts of violence are perpetrated by a single criminal: the public welfare is threatened nonetheless.

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<sup>179</sup> Cf Khayelitsha Commission *Towards a Safer Khayelitsha: Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha* (2014)168.

<sup>180</sup> GP Kemp, S Walker, R Palmer, D Baqwa, C Gevers, A Steynberg *Criminal Law in South Africa* 2 ed (2015) 7-10; H Gross *A Theory of Criminal Justice* (1979) 119.

<sup>181</sup> See especially 2 2 above.

<sup>182</sup> See especially 5 1-5 3 below.

Duff argued<sup>183</sup> that criminalisation of conduct should only take place when three preconditions are met: There must firstly be a moral wrong and the conduct will be morally reprehensible based on the harm caused or the substantial risk that the conduct carries. Secondly, the conduct demands a State response on behalf of victims and/or the wider community. Lastly, it must be necessary to underscore the wrongfulness of the vexed conduct “as something that needs to be collectively marked and censured”.<sup>184</sup> Whether the criminalisation of criminal gang activity is perfectly suitable under Duff’s modern model, is deserving of further discussion.

The harm is in fact reprehensible in that it *causes substantial risk* to the health, safety, security, property and most importantly lives of the inhabitants of the country. This is patent from the contextualisation of gang activities discussed under 2.3 above. The State therefore has a vested interest in not only protecting inhabitants from the underlying crimes but also from the particular (in a sense, systemic) *modus operandi* of criminal gangs.

Is the risk and the direct harm afflicted *by and through* criminal gangs however *morally* enough reprehensible to justify (separate) criminalisation? The “pervasive presence” and harmful impact on local communities is acknowledged in the preamble to POCA and evidenced in the previous section of this chapter; thus signalling the kind of rationale for criminalisation of criminal gang activities which we need to interrogate further. Criminal endeavours which strike at the fabric of the community (as illustrated above at 2.2 above) as such may be considered to be the foundation upon which criminalisation of the systemic aspects, the criminal gang activities, rests.

Gang members themselves are often equally victim to their circumstances. Binns-Ward J, in considering an appropriate sentence for gang members, addressed the systemic aspects (the gang culture) and stated the following

I am acutely conscious of the very real disadvantages to which young persons like the accused are subject in [Manenberg]. The circumstances are such that they and their peers are under significant temptation and enticement to become involved in gang membership and activity. This comes about not only because of pervasive poverty and

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<sup>183</sup> L McNamara “Criminalisation Research in Australia” in T Crofts & A Loughnan (eds) *Criminalisation and Criminal Responsibility in Australia* (2015) 33-35; A Duff “Towards a Modest Legal Moralism” (2014) 8(1) *Criminal Law and Philosophy* 217-226-228.

<sup>184</sup> McNamara in Crofts & A Loughnan (eds) *Criminalisation* (2015) 35 where the author refers to Duff.

unemployment, but also because of the prevailing social norms in the area, which seem to accept gang culture as part of the way of life. This is manifest by the way in which the various gangs that operate in the area have carved out territories within the suburb in which one or other of them holds sway and influence. It is also borne out by the evidence that such is the hold of gang culture in the area that there is little respect for the forces of law and order. The police are openly defied and disregarded on occasion. It is a place where life is treated cheaply, and killings and revenge killings are the order of the day. It is clear from the evidence that the unlawful possession of firearms and ammunition is commonplace in the area and that such munitions are regularly used to lethal effect.<sup>185</sup>

The Court therefore acknowledges an element of “moral condemnation” due to a general disregard for law and the safety and security of others. Although Binns-Ward J admits that this condemnation should be somewhat tempered due to difficult socio-economic circumstances, it does not absolve gang members from accountability.<sup>186</sup> More importantly for present purposes is the sentiment which directly speaks to the systemic nature of criminal gang activities, that is, the “gang culture” which needs to be confronted in a meaningful way.

Keeping the sentiments above in mind, it cannot be denied that additional State intervention is necessitated, and it must manifest in the criminalisation of *conduct*. The pervasive presence of gang-related activity in the Western Cape is undeniable. Legal intervention is justified considering the State’s constitutional duty to protect its citizens, and especially the most vulnerable and marginalised communities.

Protection of the public from a wrong is however not limited to the criminalisation of conduct to effect remedy or protect the inhabitants from the moral wrong. Other public policy responses may prove to be useful.<sup>187</sup> Poverty is at the core of the inception and continuation of the criminal gang phenomenon in South Africa. Allocating additional resources to job creation may thus steer potential gang members away from joining a criminal gang. Youth programmes, as the youth often fall victim to gang recruitment, may serve a similar purpose. The Western Cape Government has employed various non-punitive strategies and interventions to deal with criminal gangs, including a four-

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<sup>185</sup> *S v Jordaen and Others* WCC 07-02-2018 case no CC20/2017 (“*Jordaen*”) para 3.

<sup>186</sup> *Jordaen* para 4.

<sup>187</sup> See McNamara in Crofts & A Loughnan (eds) *Criminalisation* (2015) 41.



pronged approach (intelligence management; project-driven gang investigation; community mobilisation and strategic deployment of police officers).<sup>188</sup>

The role of the criminal law as a deterrent should also not be ignored. As Simester and von Hirsch plainly put it, criminal law does not politely ask “[d]o not assault others, *please*.’ It tells: ‘Do not assault others, *or else*’”.<sup>189</sup> It is questionable whether the promulgation and implementation of POCA has threatened gang members from committing gang-related crimes on the threat of punishment in the Simester and von Hirsch sense of the word. The incidences of gang-related crimes and the occurrence of gang wars has, in fact, increased since the inception of POCA. Viewed from a pure crime-prevention standpoint, POCA does not seem to have made a significant impact on the South African criminal justice system. In fact, there seems to be only one reported case on POCA Chapter 4 since its promulgation in early 1999.<sup>190</sup> The particulars and critical assessment of POCA Chapter 4 will be discussed more comprehensively in subsequent chapters of this dissertation.<sup>191</sup>

As alluded to above, there are, *for the most part*,<sup>192</sup> already existing crimes in both statute and common law which criminalise the underlying criminal gang activities (murder, assault, rape, robbery, drug-related offences and so forth). Why then criminalise criminal *gang* activities as a subspecies? It might be instructive to compare criminal gang activities with the phenomenon of terrorism in this regard.

Zedner refers to Waldron’s inconsistency in categorising acts of terror, on the one hand, as just a manifestation of the underlying crime, and on the other hand as something that transcends the underlying criminal offence.<sup>193</sup> In the first instance Waldron argues that the September 11 2001 attacks “were murders in a quite

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<sup>188</sup> D Plato “MEC Dan Plato: Briefing on provincial policing needs and priorities” (14-04-2015) Western Cape Government <<https://www.westerncape.gov.za/news/police%E2%80%99s-gang-strategy-not-stopping-scourge-gang-and-drug-related-crimes>> (accessed 21-04-2015). See above at 1 4.

<sup>189</sup> AP Simester & A von Hirsch *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011) 5.

<sup>190</sup> See also JM Mujuzi “Ten Years of The South African Prevention of Organised Crime Act (1999–2009): What Case Law Tells Us?” (2009) 10 where the author, at that time (2009), did a comprehensive study of the case law since the promulgation of POCA in its first decade of operation. The author found that there had been no reported cases implementing sections 9 and 10 of the Act.

<sup>191</sup> See Chapter 4.

<sup>192</sup> See Chapters 3 and 4 below for a comprehensive exposition on the overlap between common law and statutory mechanisms in dealing with criminal gang activities.

<sup>193</sup> L Zedner “Terrorizing Criminal Law” (2014) 8 *Criminal Law and Philosophy* 99 112-113.



straightforward sense (...)” and “[t]hey were murder pure and simple”.<sup>194</sup> In the second instance he admits that there is “a special sort of moral outrage” which transcends the moral outrage associated with non-terroristic acts of, for example, murder or destruction of property.<sup>195</sup> The latter sentiment seems to encapsulate the motivation for criminalising criminal gang activities. Waldron’s latter sentiment is reminiscent of Moseneke J’s justification of the common purpose doctrine in *S v Thebus and Another* (“*Thebus*”).<sup>196</sup> The common purpose doctrine is seen as a necessary tool in the fight against “collective criminal conduct” which is a “significant societal scourge” and the particular difficulty to prove such conduct due to the evidentiary hurdles associated with group-based crimes.<sup>197</sup> It was submitted that without the common purpose doctrine certain participants of crime would escape prosecution and this “would not accord with the *considerable societal distaste* for crimes by common design”.<sup>198</sup>

To be clear: terrorism is a *phenomenon* which may or may not be worthy of criminalisation; common purpose is a *mode of liability*. But they both share the underlying rationale, namely that the normal principles of criminal law, which tend to focus on the harmful conduct directly committed by an individual, are adjusted to express outrage about secondary effects or motive (in the case of terrorism) and assign criminal responsibility to individuals associated with criminal conduct under conditions where the normal modes of liability would be inadequate (common purpose doctrine).

We have seen that gangs and the culture of gangs are undeniably a scourge affecting not only individuals, but communities as such - especially in the Western Cape’s poorest and most marginalised communities. It is perhaps not self-evident that their underlying crimes are more of a scourge than crimes committed by individual perpetrators detached from some or other broader context or complex and therefore

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<sup>194</sup> J Waldron “Civilians, Terrorism, and Deadly Conventions” in *Torture, terror and trade-offs: Philosophy for the White House* (2010) 80 108.

<sup>195</sup> J Waldron “Terrorism and the Uses of Terror” in *Torture, terror and trade-offs: Philosophy for the White House* (2010) 108. See L Zedner “Terrorizing Criminal Law” (2014) 8 *Criminal Law and Philosophy* 113.

<sup>196</sup> 2003 (6) SA 505 (CC).

<sup>197</sup> *Thebus* para 34. The most significant evidentiary hurdle is pinpointing the main actor(s) causally responsible for the unlawful consequence. The argument that certain participants of crime would escape conviction is fundamentally flawed and is critiqued below at 3 3 4.

<sup>198</sup> *Thebus* para 40 (own emphasis).

deserving of some sort of super-criminalisation. Moseneke J is however of the opinion that “collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals”.<sup>199</sup> Snyman rejects this argument and asserts that there is no difference between an infringement of rights by an individual or by a group,<sup>200</sup> which echoes Waldron’s first sentiment. A harm is, simply, a harm.

Snyman also rejects Moseneke J’s submission that without the common purpose doctrine certain participants of crime would escape prosecution and this “would not accord with the considerable societal distaste [public opinion] for crimes by common design”.<sup>201</sup> The author in support relies on the Constitutional Court judgment in *S v Makwanyane* (“*Makwanyane*”)<sup>202</sup> where the Court rejected societal and public opinion as grounds to retain the death penalty.<sup>203</sup> It can be however be safely assumed that, considering the rampant nature of crime in South Africa,<sup>204</sup> public opinion in favour of criminalisation and punishment remain strong. Regardless, it will become clear throughout this dissertation that the rationale for the criminalisation of group-based crimes like criminal gang activities, and the justification for the application of modes of liability such as the common purpose doctrine and the doctrine of joint criminal enterprise in the context of criminal gang activities, should not simply be regarded as pragmatic “crowd-pleasing” exercises, but rather as principled efforts to confront the very real problem of criminal gang activities in a legally and constitutionally defensible way.

An additional consideration is the principle of fair labelling.<sup>205</sup> There should be appropriate “labelling” for the wrong that has been committed because not all crimes are equal: some are lesser, and some are more serious in nature. Placing crimes in broad, generic categories, such as crimes against the person or property, and not

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<sup>199</sup> *Thebus* para 40.

<sup>200</sup> Snyman *Criminal Law* 262-263 fn 55.

<sup>201</sup> *Thebus* para 40.

<sup>202</sup> 1995 (3) SA 391 (CC).

<sup>203</sup> *Makwanyane* at paras 88-89.

<sup>204</sup> See for example *S v Nombewu* 1996 (2) SACR 396 at 422-423 where the court mentions “state of lawlessness prevailing in the country” in public perceptions of the ineffectual criminal justice system allowing criminals to escape justice brought about (*inter alia*) due to police incompetence. Also see *S v Soci* 1998 (2) SACR 275 (E) at 295.

<sup>205</sup> See Chapter 3 for a further discussion of the doctrine of fair labelling.

differentiating further seems somewhat detached from any meaningful labeling. The crimes must with sufficient precision indicate the exact nature and seriousness and underlying protected interest.<sup>206</sup> Thus, it may be insufficient to label a member of a criminal gang based solely on his most recent offence (of, say, assault). Criminal gang activity, the repeated or habitual pattern of criminal conduct causing systemic fear, risk and harm in the affected communities, should simply be viewed as more than the sum of any number of individual crimes. There is a difference between Mr X, who is a common thief and Mr Y, who is a gangster. Mr Y is immediately associated with a myriad of unidentified crimes, which are associated with the “gangster lifestyle”, and this is the underlying cause of harm to the community. But, at the same time, this “labelling” by the community can be unfair, because Mr Y may just have committed relatively minor gang-related offences but is now painted with the same broad brush along with Mr Z, a man responsible for several brutal murders.

Let’s return for a moment to the terrorism example: Acts of terror often occur on a grandiose scale – evoking immense fear and panic in the process. Indeed, *to cause fear* is the most obvious element of terrorism (together with motive). If death occurs in such a mass attack, the deaths may not be forensically or legally distinct from mass murder by an individual. That is also the case with a gang attack. If a criminal gang carries out a group assault, murder, or drug deal, those underlying crimes are still, for the most part, objectively and definitionally, identical to instances of crime committed by a single perpetrator. This sense of terror is also evoked in gang related crime. Indeed, as we have seen from earlier discussion, the prevalence of criminal gang activities in certain communities in the Western Cape is so systemic, amounting to a “gang culture”, that there should in principle be no reason to view the justification for the criminalisation of terrorism any differently from the criminalisation of criminal gang activity.

It is therefore perhaps not surprising to find broader rationales mentioned in the preamble to POCA. There is firstly a general statement indicating that organised crime, money laundering and criminal gang activities infringe the rights of the inhabitants of the Republic. Next, it is stated that the inhabitants have the right to be protected from fear, intimidation and physical harm. This objective is also echoed in the Constitution. Section 12(1)(c) of the Constitution, 1996, protects the unqualified constitutional right

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<sup>206</sup> Simester & von Hirsch *Criminalisation* (2011) 202-204.

of being free from violence from private or public sources.<sup>207</sup> The trinity of crimes addressed in POCA, individually and collectively “present a danger to public order and safety” which poses a risk to cause social damage. The harmful impact of criminal gangs is acknowledged due to their “pervasive presence” and harmful impact on those communities. It is therefore clear that the preamble to POCA is not simply a rhetorical flourish added to three groups of crimes previously unknown to South African criminal law. The preamble serves as a reminder of the *rationale* for the criminalisation of crimes that affect interests deeper and broader than the individual criminal acts that form the predicate offences of systemic and complex crimes such as racketeering, money laundering and criminal gang activities.

The second important reason for the criminalisation of criminal gang activities goes beyond the underlying protected interests and focuses on the more operational question of the effectiveness of the existing common law and statutory law arsenal for purposes of combating the type of crimes associated with criminal gang activities. Effectiveness in this context is understood in terms of the utility of existing common law and statutory crimes (murder, robbery, theft, public violence and so on) in order to achieve successful prosecutions of behaviour that fall within the parameters of what were earlier identified as gang-related activities in certain communities, such as in the Cape Flats. These issues will be explored in more detail in Chapter 3 and beyond.

## 2.5 Concluding remarks

At the end of this chapter we need to ask the question: Is specific anti-gang legislation truly necessary? The answer to this question can only be in the affirmative if the legislation supplements previously existing common law and statutory offences in a meaningful way and in a way which is congruent with public policy. And public policy, presumably, should reflect the interests of society, including the interests of the most vulnerable and the most marginalised. This question will provisionally be answered in Chapter 3 (investigating common law pertaining to group or collaborative criminality) and Chapter 4 (investigating the crimes created by POCA). The outcome of both chapters will then further be subjected to comparative and international law analyses before a final submission is made regarding the current dispensation and the way forward for the criminalisation of gang activity in South Africa.

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<sup>207</sup> This will be discussed in detail below in Chapter 5.

## Chapter 3

# The common law and group or collaborative criminality

### 3 1 Introduction

Before the enactment of the Prevention of Organised Crime Act 121 1998 (“POCA”), certain common law mechanisms were available that could be utilised in the fight against gang or group-based crimes. Various new crimes have however been created in terms of Chapter 4 of POCA that assist in the anti-gang fight.

The effectiveness of criminalising gang-related crime has been questioned. Burchell, for example, suggests that the common law is more flexible in dealing with the phenomenon of criminal gang activities instead of proscribing “specific conduct in advance” by presupposing that gangs share certain immutable characteristics.<sup>208</sup>

It has also been argued that the crimes enumerated in Chapter 4 of POCA are not legislative innovations but in fact resemble various common law and statutory offences that were available before the promulgation of POCA.<sup>209</sup> These include the crimes of common law and statutory incitement, conspiracy, attempt, public violence and also liability under the common purpose doctrine. The common purpose doctrine may be considered to be the closest mechanism under the common law to specifically address group-based criminality.

This chapter will firstly provide an overview of the aforementioned mechanisms that were available prior to the enactment of POCA. One of the main motivations for the legislative intervention is the perceived inability of the common law and statutory law to effectively address the growing phenomenon of criminal gang activity and also to

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<sup>208</sup> Burchell *Principles of Criminal Law* (2016) 5 ed 909-910. This is certainly a valid point of critique and will be discussed below. The effectiveness of the crimes enumerated in POCA do function greatly on the hypothesis that gangs operate in certain fashions.

<sup>209</sup> CR Snyman “Die nuwe statutêre misdaad van deelname aan 'n kriminele bende” (1999) 12 *South African Journal of Criminal Justice* 213 217-221.

keep in pace with international measures<sup>210</sup> such as the United Nations Convention against Transnational Organized Crime (“the Palermo Convention”).<sup>211</sup> This chapter will additionally investigate to what extent the crimes under section 9 of POCA overlap or interact with the aforementioned common law crimes and modes of liability, notably the common purpose doctrine. Furthermore, it will be discussed whether these common law crimes and modes of liability are still useful in the fight against gang-based crimes and if they could still be advantageous through judicial development or legislative intervention.

### 3.2 Constitutional imperatives

The development the common law is in line with the constitutional obligation placed on the judiciary in terms of section 39(2)<sup>212</sup> to develop the common law and to promote the “spirit, purport and objects of the Bill of Rights” when doing so. In fact, the Constitutional Court in *Carmichele v Minister of Safety and Security* (“*Carmichele*”)<sup>213</sup> confirmed that, in terms of section 39(2) (read with section 173)<sup>214</sup> of the Constitution, this is an *obligation* and not a discretionary function when there is a deficiency in the

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<sup>210</sup> This is undoubtedly one of the reasons behind the promulgation to POCA. The preamble clearly states that “(...) the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities.” The Constitutional Court in *Mohunram and Another v NDPP and Another* (Law Review Project as Amicus Curiae) 2007 (2) SACR 145 (CC) at para 144 also discussed the rationale behind POCA. Sachs J, in his separate judgement, described the rationale behind POCA as two-pronged. Firstly, to address, *inter alia*, criminal gang activities which had become an “international problem and security threat”. POCA was secondly aimed at punishing the leaders of criminal organisations that were usually far removed from the actual execution of crimes by his or her criminal enterprise. See also Chapter 1 and 2 above; A Standing *Organised crime: A study from the Cape Flats* (2006) 45.

<sup>211</sup> United Nations Convention against Transnational Organized Crime and the Protocols Thereto (adopted 14 December 2000, entered into force 20 February 2004) 40 ILM 335.

<sup>212</sup> “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

<sup>213</sup> 2001 (4) SA 938 (CC).

<sup>214</sup> This section confirms the inherent powers of the higher courts (the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa) which includes the powers “to develop the common law, taking into account the interests of justice.”

common law.<sup>215</sup> The Court went further to state that there is a two-stage inquiry regarding the development process that a court has to undertake. An empowered Court must firstly evaluate whether the common law necessitates reconsideration in terms of the objectives set in section 39(2) and if that is in fact the case, the court must then evaluate how to develop the common law in order to bring it in line with the objectives in section 39(2).<sup>216</sup> In fact, the constitutional obligation of courts goes further than merely adopting an interpretation that does not limit the rights contained in the Bill of Rights,<sup>217</sup> courts should rather seek to adopt an interpretation that would both avoid limiting those rights *and also* promote them.<sup>218</sup> In the context of the development of the criminal law, one should be mindful that section 39(2) should not be applied overzealously and courts must adhere to the principle of legality, notably the aspect of *ius strictum*.<sup>219</sup>

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<sup>215</sup> *Carmichele* para 39. Also see *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (“*Makate*”) reaffirms this position and refers to the Court’s own previous judgement in *Fraser v ABSA Bank Limited* 2007 (3) SA 484 (CC) (“*Fraser*”) where section 39(2) was interpreted to be a mandatory tool of interpretation to which all statutes must be construed.

<sup>216</sup> *Carmichele* para 39. This test has been formulated somewhat differently in subsequent judgements by the CC. Moseneke J in *S v Thebus and Another* 2003 (6) SA 505 (CC) (“*Thebus*”) at para 32. Moseneke J (in the majority decision by the Constitutional Court) in *S v Thebus and Another* 2003 (6) SA 505 (CC) (“*Thebus*”) at para 32 held that the “threshold analysis” was whether a rule of the common law limits one of the entrenched rights in the Constitution. If that is in fact the case and the limitation is also not “reasonable and justifiable” then a court would be obliged to develop it in order to bring it in line with the constitutional right it is in conflict with. The CC in *Makate* at para 88 more recently held that section 39(2) is “activated” when a court is involved in statutory interpretation and the relevant provision “implicates or affects rights in the Bill of Rights”. There are slight, nuanced differences here. The approach in *Thebus* requires a limitation of rights while there is a broader approach in *Carmichele* which only requires a “deficiency” in the common law requiring “reconsideration”. *Makate* follows a different approach by requiring there to be some sort of rights-implication to activate the constitutional duty. This provides a substantially broader sphere for courts to embark on a section 39(2) development. The *Carmichele* and *Makate* approaches are more closely reminiscent of the wording of section 39(2) in that it does not necessarily require a rights conflict for the common law to be developed.

<sup>217</sup> *Fraser* para 43.

<sup>218</sup> *Makate* para 89.

<sup>219</sup> See CR Snyman “Extending the Scope of Rape – A Dangerous Precedent” (2007) 124 *South African Law Journal* 677 678-682 in particular. Also see K Phelps “A Dangerous Precedent Indeed—A Response to CR Snyman’s Note on *Masiya*” (2008) 128(4) *South African Law Journal* 648 for a response to Snyman’s censure of the judgement in *Masiya v Director of Public Prosecutions, Pretoria and Another* (Centre for Applied Legal Studies and Another, Amici Curiae) (“*Masiya*”) 2007 (5) SA 30 (CC).



### 3 3 The common purpose doctrine

#### 3 3 1 *Origins and introduction into South African law*

The common purpose doctrine is, in certain instances, a departure from traditional individual criminal liability which punishes a participant's *own* involvement and contribution to a criminal consequence. The doctrine originates from English law and was first incorporated into South African law via the Native Territories Penal Code Act 24 of 1886 ("the Penal Code").<sup>220</sup> Section 78 stated that

[i]f several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by anyone of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.

In *R v Garnsworthy* ("Garnsworthy"),<sup>221</sup> one of the earliest cases dealing with the common purpose doctrine, a group of miners participated in a strike and forced others to stop their labour through the use of firearms. The eight parties who resisted the force of the group were killed.<sup>222</sup> This case incorporated and "recognised" the doctrine as part of the South African common law (rather than its exclusive Cape Colony jurisdiction).<sup>223</sup> In *Garnsworthy*, the Court expressed the common purpose doctrine as follows:

Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object. If on the other hand what is done is something which cannot be regarded as naturally and reasonably incidental to the attainment of the object of the illegal combination, then the law does not regard those who are not themselves personally responsible for the act as being liable; but if what is done is just what anybody engaging in this illegal

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<sup>220</sup> See generally PN Makiwane *The Nature of Association and Dissociation for Common Purpose Liability* LLM thesis University of South Africa (1999) 2.

<sup>221</sup> (1923) WLD 17.

<sup>222</sup> *Garnsworthy* at 17.

<sup>223</sup> Burchell *Principles* 479 fn 31.



combination would naturally, or ought naturally to know would be the obvious and probable result of what they were doing, then all are responsible.

### 3 3 2 *Rationale for the rule and prominent applications*

The common purpose doctrine once again rose to relevance and public consciousness after the violent confrontation originating from an unprotected strike at the Lonmin platinum mines in Marikana in August of 2012.<sup>224</sup> The National Prosecuting Authority (“NPA”) in the North West province expressed its intention to charge 270 miners with murder under the common purpose doctrine after the death of 34 other miners who died as a result of injuries sustained during the violence and chaos that occurred at Marikana. This decision was met with great public backlash and media attention.<sup>225</sup> The following month, the NPA decided not to go forward with this course of action.<sup>226</sup> The proposed use of the common purpose doctrine was met with questions concerning the legitimacy of the doctrine reminiscent of the international outcry against the doctrine after the so-called “Sharpeville Six” trial in *S v Safatsa*.<sup>227</sup> The common purpose doctrine is however still the law of the land in South Africa.

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<sup>224</sup> See Marikana Commission of Inquiry *Report on Matters of Public, National and International Concern Arising out of The Tragic Incidents at The Lonmin Mine in Marikana, in The North West Province* 46; 57ff. in GN 699 GG 38978 of 10-07-2015.

<sup>225</sup> See J Grant “Common purpose: *Thebus*, Marikana and unnecessary evil” (2014) 30 *South African Journal of Human Rights* 1 16; J Grant “Marikana: ‘Common purpose not outdated or defunct’” (31-08-2012) *M&G* <<http://mg.co.za/article/20120831marikanacommonpurposenotoutdatedordefunct>> (accessed 28-03-2016); Anonymous “South African Marikana miners charged with murder” (30-08-2012) *BBC* <<http://www.bbc.com/news/world-africa-19424484>> (accessed 17-05-2016). The then-minister of Justice and Constitutional Development, Jeff Radebe, even commented that “[t]here is no doubt that the decision has induced a sense of shock, panic and confusion within the members of the community and the general South African public” – see J Herskovitz “South Africa shocked by move to charge miners with massacre” (31-08-2012) *Reuters Africa* <<http://af.reuters.com/article/worldNews/idAFBRE87U0MC20120831>> (accessed 17-05-2016).

<sup>226</sup> M de Waal “Marikana: NPA drops ‘common purpose’ charges, but critical questions remain” (03-09-2012) *Daily Maverick* <[http://www.dailymaverick.co.za/article/20120903marikananpadropscommonpurposechargesbutcriticalquestionsremain/#.Vvhmg\\_l96hc](http://www.dailymaverick.co.za/article/20120903marikananpadropscommonpurposechargesbutcriticalquestionsremain/#.Vvhmg_l96hc)> (accessed 28-03-2016).

<sup>227</sup> 1988 (1) SA 868. For general criticism against the doctrine, see L Sisilana “What’s wrong with common purpose” *South African Journal of Criminal Justice* (1999) 287 300-301; Cameron “When Judges Fail Justice” (2004) 120 *South African Law Journal*; M Reddi “The Doctrine of Common Purpose Receives The Stamp of Approval” (2005) 122(1) *South African Law Journal* 59 63-64.

The common purpose doctrine, a mode of liability under the common law, has been one of the few available measures to specifically address group-based criminal activity.<sup>228</sup> The conduct of persons who commit a criminal act in concert, is imputed to one another regardless of their actual degree of participation or causal contribution. This imputed liability is extremely advantageous in situations of group-based crimes where the prosecution (and subsequently even the courts) are unable to determine who were causally responsible for bringing about the unlawful act, especially consequence crimes<sup>229</sup> such as murder.<sup>230</sup> In *R v Morela* (“*Morela*”),<sup>231</sup> it could not be determined which one of three burglars fired the shot that killed the deceased or even who had been in possession of the firearm. The State however did show that the accused in question was one of these burglars and that one of them, at least, was in possession of the firearm in question. Rabie posits that the Court accepted the argument that the accused parties foresaw the possibility that the firearm could be used to kill someone in the commission of their unlawful act and furthermore recklessly reconciled themselves with that possibility.<sup>232</sup>

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<sup>228</sup> The other significant measure under the common law to address group-based criminal activity is the crime of conspiracy, which will be discussed below at 3.4.

<sup>229</sup> The Constitutional Court in *Makhubela v The State; Matjeke v The State* [2017] ZACC 36 (*Makhubela*) re-affirmed the law pertaining to the use of the common purpose doctrine in circumstance crimes – specifically the unlawful joint-possession of firearms. Mhlantla J refers to Burchell who correctly points out that the common purpose doctrine, when applied to circumstance crimes, does not operate in the same fashion as it does with consequence crimes (*Makhubela* para 48; Burchell *Principles* 483-484). Court unanimously finds that the court *a quo* erred in its finding that the applicants “that the applicants had the intention to exercise possession of the firearms through the perpetrators who had firearms in their possession” (para 56). Mhlantla J approvingly refers to and relies on the test in *S v Nkosi* 1998 (1) SACR 284 (W) (“*Nkosi*”). It was held there that the group must possess both the requisite intention “to exercise possession of the guns through the actual detentor” and secondly that “the actual detentors had the intention to hold the guns on behalf of the group” (*Nkosi* at 286). The Constitutional Court therefore finds that these requirements would only be present in very limited scenarios – especially because of the difficulty in proving the possessor’s intention to hold the firearms on behalf of the group. Joint-possession of firearms can therefore not be described as pure common purpose (in either of its forms) but a permutation thereof.

<sup>230</sup> See *Safatsa* at 898 for the comments concerning imputed liability by Botha JA. Also see MA Rabie “The Doctrine of Common Purpose in Criminal Law” (1971) 88 *South African Law Journal* 227 230 where the author mentions that the doctrine is almost exclusively applied to murder cases. This still holds true today. Also see Snyman *Criminal Law* 258.

<sup>231</sup> [1947] (3) All SA 310 (A).

<sup>232</sup> See Rabie (1971) *South African Law Journal* 231; *Morela* 136.

Crimes perpetrated in groups are also perceived as a greater societal affront than crimes committed by individuals.<sup>233</sup> The doctrine thus serves a *perceived* societal interest by punishing crime that may otherwise have gone unpunished if the *actual* perpetrator of the crime cannot be identified beyond a reasonable doubt.<sup>234</sup> This however is a false dilemma, as stated above, because participants in group-based crimes may be held liable through other inchoate crimes.<sup>235</sup>

Although the doctrine is best known for its application in murder cases, it can equally as usefully be applied to where groups of perpetrators are involved in cases of arson, malicious damage to property,<sup>236</sup> public violence or assault.

Common purpose, as a mode of liability, is a departure from the traditional principles of criminal law, which aims to identify an individual's personal contribution to an unlawful act and then appropriately punishing that individual.<sup>237</sup> This fundamental principle of criminal liability is also known as the principle of individual criminal

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<sup>233</sup> See above at 2 4 1 for reference to Moseneke J's majority judgment in *Thebus* at para 40 referring to the necessity of the common purpose doctrine and Snyman's rebuttal (Snyman *Criminal Law* 262-263 fn 55) – using *Makwanyane* as authority.

<sup>234</sup> See Kemp et al *Criminal Law* (2015) 258; Snyman *Criminal Law* 256.

<sup>235</sup> See 2 4 2 above.

<sup>236</sup> See *Thebus* para 34 while illustrating the usefulness of the doctrine.

<sup>237</sup> This principle has also received significant attention in international *ad hoc* tribunals. See for example *Prosecutor v Tadić* IT-94-1-A (15 July 1999) ("*Tadić*") where the Appeals Chamber International Criminal Tribunal for the Former Yugoslavia ("ICTY") (per Nieto-Navia J) at para 186 refers to this principle, specifically in the context of Article 7(1) of the Statute of the International Tribunal for the Former Yugoslavia ("ICTY Statute") which specifically refers to individual criminal liability. Nieto-Navia J further refers to (at fn 228-229) article 27(1) of the Italian Constitution 1947 (*Costituzione della Repubblica Italiana*) which simply states that criminal responsibility or liability is personal or "[l]a responsabilità penale è personale") as well as the article 121-1 of the French *Code Pénal* 2016 which states - "[n]ul n'est responsable pénalement que de son propre fait" or "[n]o one is criminally liable except for his own conduct"). At fn 230 he states that the principle is only tacitly expressed in case law. This may be the situation in terms of South African criminal law, as it appears that there is no express law or constitutional provision establishing individual criminal responsibility. See generally with regards to group-based crimes being a departure from the general principles of criminal law M Cowling "Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998" (1998) 11 *South African Journal of Criminal Justice* 350 368.

responsibility. This principle is also expressed in the maxim *nulla poena sine culpa*.<sup>238</sup> Individual criminal responsibility can be traced to the philosophical notions of free will and self-determination.<sup>239</sup> Individuals are (subject to certain exceptions such as mental illness) autonomous actors and agents of their free will. Autonomous individuals face daily choices between engaging in illegal activity or not. Based on those assumptions, criminal responsibility should only arise when an individual has personally acted.

The common purpose doctrine is consequently a departure from that principle due to the imputation of criminal liability to individuals who may or may not have, through their autonomous actions, contributed to the commission of an unlawful act. The State *does* still need to prove that the actions of the accused parties, either individually or collectively, caused the unlawful consequence.<sup>240</sup> The element of causality does not fall away. The crime did not simply appear out of thin air; it was, of course, *caused*. What falls away is the need to causally link each individual perpetrator's conduct to the criminal outcome (for instance, death of another human being, in the case of the crime of murder).

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<sup>238</sup> It is however an accepted principle, for example in international criminal law, that this is not an absolute rule and may be negated in certain circumstances. See (for example) especially paras 189-190 of the *Tadić* appeal by Nieto-Navia J where he explains that it is clear from the wording of the ICTY Statute that not only persons "who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (...) including *conspiracy, incitement, attempt and complicity*". Nieto-Navia J comes to the conclusion that the ICTY State also aims to include those "participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons".

<sup>239</sup> See G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg *Criminal Law in South Africa* 2 ed (2015) 14-15.

<sup>240</sup> Paizes submits that common purpose is often misunderstood as disposing of the causal element and refers to this as "[t]he illusion of the disappearing causal element" – which has even confused the Constitutional Court in *Thebus* (see paras 37-38). The author correctly submits that the causal element remains in proving the specific crime, for instance murder. See A Paizes "Why do we so often get common purpose wrong" (2017) 2 *Criminal Justice Review* 4 4. Although the crux of this argument is accurate, it is not completely true. A causal contribution is *attributed* to other participants of the common plan who may or may have not *physically* contributed to the unlawful consequence, where their contribution to the scheme cannot be proven by the State. Proof of the causation element is absent *for them*. That is the entire function of the doctrine.

The application of the common purpose doctrine can be seen as an affront to the so-called principle of fair labelling.<sup>241</sup> This principle requires that the verdict imposed on an accused to be a fair and accurate reflection of what the individual accused had in fact done.<sup>242</sup> A criminal conviction inflicts an *iniuria* on a convicted individual, viewed through the impact that a conviction holds on his or her human dignity; the stigma of a conviction as a human stain.<sup>243</sup> It follows, then, that the principle of fair labelling is offended in certain cases where the common purpose doctrine is applied. When the prosecution decides to employ the common purpose doctrine in a situation where three suspects are involved in a shooting and it is not determinable who fired the fatal shot, an application of the principle of fair labelling will tell us that two of the accused could potentially be unfairly labelled in relation to their criminal contributions. It should, however, be noted that the principle of fair labelling is not prominent in the case law or literature on the topic of common purpose in South African criminal law.

Back to the case law and literature on common purpose: The Appellate Division stated in *Safatsa* that requiring the element of causation in common purpose cases would stretch the concept of causation and would even ultimately lead to courts resorting to “psychological causation” which would “border on absurdity”.<sup>244</sup> This construction of the doctrine was later confirmed by the Constitutional Court in *S v Thebus and Another* (“*Thebus*”).<sup>245</sup>

The modern formulation of the doctrine has been coined by Burchell and Milton and has approvingly been relied on in *Thebus*:

Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime [...]<sup>246</sup>

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<sup>241</sup> Kemp et al *Criminal Law* 21. The author points out that this principle has not yet received explicit recognition in South African courts but this should be the case as an embodiment of the right to human dignity in terms of section 10 of the Constitution.

<sup>242</sup> Kemp et al *Criminal Law* 20.

<sup>243</sup> Kemp et al *Criminal Law* 20.

<sup>244</sup> *Safatsa* 900-902.

<sup>245</sup> 2003 (6) SA 505 (CC).

<sup>246</sup> See Burchell *Principles* 477; *Thebus* para 18.

### 3 3 3      *Application: Prior agreement and active association*

Liability on the basis of common purpose can arise either from prior agreement or active association. If there is a prior agreement to commit an unlawful act, common purpose liability will be imputed to each of the parties to that agreement. If, for example, X and Y agree to kill Z but the State is unable to prove who carried out the murder, both X and Y could be held liable as co-perpetrators in the murder in terms of common purpose.<sup>247</sup> Unlike in cases of active association, a party to a common purpose *via* prior agreement need not be present at the scene of the unlawful act.<sup>248</sup>

The active association form of the doctrine is the more doctrinally and constitutionally problematic manifestation of the doctrine. This is due to the fact that there is often less reliable evidence on which to prosecute and “acts of association” are sufficient to attract liability.

Where there is no proof of a prior agreement, common purpose liability may arise from active association in an unlawful act. The Appellate Division in *S v Mgedezi* (“*Mgedezi*”)<sup>249</sup> elucidated the special requirements for common purpose by active association. The accused must firstly have been present at the scene of the unlawful act. Then, secondly, the accused must be aware of the commission of the unlawful act. Next, the accused must have had the intention to make common cause with the actual perpetrators of the unlawful act. The accused must also importantly, though an overt act of association, manifest his or her shared common purpose with the perpetrators. Lastly, the accused must possess the requisite *mens rea*, specifically intent and the Court specified that *dolus directus* or *dolus eventualis* would satisfy the fault requirement. That means that the accused must have intended for the deceased to be killed or must foresee the possibility of the aforementioned consequence and perform an “act of association with recklessness as to whether or not death was to ensue.”<sup>250</sup>

In *S v Mzwempi* (“*Mzwempi*”)<sup>251</sup> the Eastern Cape Division of the High Court suggested a limitation to active association by recommending that in order to secure

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<sup>247</sup> See for example the facts of *Morela* above.

<sup>248</sup> Kemp et al *Criminal Law* 262.

<sup>249</sup> 1989 (1) SA 687 (A).

<sup>250</sup> *Mgedezi* 705-706.

<sup>251</sup> 2011 (2) SACR 237 (ECM).

a conviction based on common purpose liability, it must be shown that the accused had actively associated with the particular conduct that brought about the unlawful consequence and not *any* consequence that occurred in the commission of *any* unlawful act.<sup>252</sup> In other words, an accused must have the specific intent for a certain unlawful consequence to occur and not merely foresight. This will be discussed in more detail below.

### 3 3 4 *Problems with the doctrine*

#### 3 3 4 1 ***Constitutional issues***

The common purpose doctrine is one of the most controversial doctrines in South African law. It received constitutional affirmation especially in the active association form by the Constitutional Court in *Thebus*. Moseneke J delivered the majority judgment for the Court and gave several reasons for his finding. There are still however several issues that could be subject to constitutional scrutiny and debate.

The doctrine has largely been justified based on public policy considerations. It has been reasoned that the doctrine addresses the societal need to “criminalise collective criminal conduct” which is a “significant societal scourge” and also to relieve the legal difficulties in proving the causal contribution of each participant in such collective criminal conduct.<sup>253</sup> This disempowers these criminal groups, which would usually be able to hide under a legal guise where the prosecution could not prove causal contribution of each or any of the accused parties involved beyond a reasonable doubt. It must however be noted once more that this argument mainly holds true for the substantive offence committed (for example murder or assault) but not for associated inchoate crimes (such as incitement or conspiracy to commit said substantive offence).

The Court in *Thebus* disagreed with the broad contention that the doctrine offended any constitutional rights and even went as far as to state that “(...) there is no objection to this norm of culpability even though it bypasses the requirement of causation” because it is a means to address group-based crime.<sup>254</sup> Moseneke J asserted that that there is no inherent common law requirement for crimes to have a causation element and that principle applies to the common law as well as statutory offences.

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<sup>252</sup> *Mzwempi* paras 108-109 especially.

<sup>253</sup> *Thebus* para 34.

<sup>254</sup> *Thebus* para 40.



Crimes are however required to be constitutionally compliant and according to the Court, this means that

[i]t may not unjustifiably limit any of the protected rights or offend constitutional principles. Thus, the criminal norm may not deprive a person of his or her freedom arbitrarily or without just cause. The 'just cause' points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason and to the procedural right to a fair trial.<sup>255</sup>

It was pointed out by the Court that the constitutionally protected rights of an accused may also not be infringed upon unless it is based on a justifiable reason – here relying on O'Regan J's separate opinion in *S v Coetzee* ("Coetzee").<sup>256</sup> There it was said that the specific form of culpability must "justify the deprivation of freedom without giving rise to constitutional complaint".<sup>257</sup>

The more pertinent constitutional issue was, possibly, the alleged violation of an accused's presumption of innocence in terms of section 35(3)(h) of the Constitution, which forms part of an accused's right to a fair trial. This argument was based on the contention that because the doctrine negates the requirement of causation, it lessens evidentiary burden of the State to prove all elements of the crime and therefore offends an accused's presumption of innocence by creating the possibility of conviction despite there being reasonable doubt as to their innocence. In addressing this alleged violation, Moseneke J refers to *S v Bhulwana; S v Gwadiiso* ("Bhulwana")<sup>258</sup> where the importance of the presumption of innocence was re-affirmed and the Court confirmed that the prosecution bares the onus to prove "all the elements of a criminal charge".<sup>259</sup> The context in that case was the effect of presumptions on the burden of proof which relieved the prosecution of part of its evidentiary burden of proving all the elements of a particular crime.<sup>260</sup>

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<sup>255</sup> *Thebus* para 39.

<sup>256</sup> 1997 (3) SA 527.

<sup>257</sup> *Coetzee* para 178; *Thebus* paras 36-37.

<sup>258</sup> 1996 (1) SA 388.

<sup>259</sup> *Bhulwana* para 15 in turn relying on *S v Zuma and Others* 1995 (4) BCLR 401 (SA) ("*Zuma*") para 33. Also see JC de Wet "Strafreg" 4 ed (1985) 193 where the author also addressed the issue of the circumvention of the most basic tenants of criminal liability when applying the common purpose doctrine.

<sup>260</sup> *Bhulwana* para 15.



Moseneke J then justifies the negation of the causal nexus in common purpose cases by stating that it neither constitutes a reverse onus nor a presumption and that “(...) there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to his or her guilt.”<sup>261</sup> That is highly debateable. Criminal liability is based on proving all of the elements of a particular crime beyond a reasonable doubt. That statement can consequently not be supported when one considers the stark departure from the traditional principles of criminal law. If the rationale in *Bhulwana* had to be applied to the application of the common purpose doctrine, then it is clear that the prosecution is relieved of its heavy evidentiary burden in establishing causation in group-based crimes.

The rationale in *Bhulwana* can be traced back to the judgment in *S v Zuma and Others*.<sup>262</sup> There Kentridge AJ posited that the common law rules pertaining to the burden of proof are inherent in the fair trial rights under the Interim Constitution.<sup>263</sup> This postulation was based on the “centuries-old” principle of English law which was famously expressed by Sankey LC *Woolmington v Director of Public Prosecutions* (“*Woolmington*”),<sup>264</sup> namely that “at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt”.<sup>265</sup> This fundamental principle of criminal law should not be circumvented merely for policy considerations of crime control.

It is not sufficient, as Moseneke J posited, “to prove beyond a reasonable doubt all the elements of the crime charged under common purpose” because it imputes a

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<sup>261</sup> *Thebus* 530-531. It has however been suggested that this the doctrine does in fact constitute a reverse onus when a party to it decides to disassociate themselves with the common scheme due to the substantial evidentiary burden in proving this. Kemp et al point to the Appellate Division’s phrasing in *S v Nduli and others* 1993 (2) SACR 501 (A) (“*Nduli*”).<sup>261</sup> There it was held (at 504) that the greater an accused’s conduct was in the unlawful act, “(...) the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to disassociate himself (...)”. See Kemp et al *Criminal Law* 266-267. This was also the opinion of the SCA in *S v Lungile and another* 1999 (2) SACR 597 (SCA) (“*Lungile*”). The SCA stated that mere withdrawal would be insufficient in cases where an accused had a substantial contribution in the execution of the common purpose. Acts such as a notification to the other members of the common purpose or “nullification or frustration” of the common purpose would suffice in such instances (see *Lungile* para 20).

<sup>262</sup> 1995 (4) BCLR 401 (SA).

<sup>263</sup> Especially subsections 25(2) and (3)(c) as well as (d). See *Zuma* para 33.

<sup>264</sup> [1935] AC 462 (HL).

<sup>265</sup> *Woolmington* at 481.

causal connection to an accused who may have not contributed in a sufficient fashion to be held liable otherwise. In other cases, an accused could still rebut or contest that his conduct causally contributed to the unlawful outcome but it is impossible here. It is submitted that it even goes so far as to violate section 35(3)(i) of the Constitution which forms part of the fair trial rights of an accused “[including] the right to adduce (...) evidence”. Here, the accused is prevented from the opportunity to even adduce evidence that his acts did not, at least to the extent that it may cause reasonable doubt, causally contribute to the unlawful consequence. This imputation, as Burchell also points out, is far more extreme than a reverse onus or a presumption (as in *Bhulwana* and *Zuma*).<sup>266</sup> It must be kept in mind that proving the requirements for the common purpose doctrine (thus the imputation of liability) is not the same as proving the traditional elements of the substantive crime. The doctrine (which is a mode of liability) is merely a mechanism to relieve the evidentiary and legal hurdles in proving a crime committed in concert.<sup>267</sup>

Moseneke J, when referring to O'Regan J's separate opinion in *Coetzee*, however does not rely on O'Regan J's further statements including that *all* the elements of the specific crime have to be proven before a conviction can be secured.<sup>268</sup> Applying the doctrine to cases such as murder, it does not become necessary to prove all of the elements of the crime. Even though it is true that causation is not an element in *all* crimes, it *is* an element in the crimes in which the doctrine is mostly applied to, namely the crime of murder. It is unfair to negate the causation requirement merely because of the difficulties in prosecuting group-based crimes. If it is justifiable to negate the causation requirement in order to satisfy public policy considerations, why not apply it to other problematic areas of the law?<sup>269</sup> This rationale for the negation of the causal requirement also does not extend to all instances where the common purpose rule is applied. Grant points out that the necessity for the State to negate this element mostly

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<sup>266</sup> Burchell *Principles* 481-482.

<sup>267</sup> Compare with joint enterprise doctrine in English law where the participants to a joint criminal enterprise are not convicted as co-perpetrators. See 3.3.6.1 below.

<sup>268</sup> *Coetzee* para 189.

<sup>269</sup> See Grant (2014) *South African Journal of Human Rights* 16. The author uses the example of rape and that it is notoriously difficult to prove the absence of consent requirement. By using the reasoning by Moseneke J in *Thebus*, this requirement could be disposed of in favour of facilitating easier prosecutions.

occurs in “mob-attack situations” where it is difficult to prove which participants factually contributed to the unlawful act.<sup>270</sup> This was indeed the case in *Safatsa*, *Thebus* and to an extent *Mzwempi*. This is not usually true in pure prior agreement cases, where it is often possible to discern which accused contributed to which unlawful acts.<sup>271</sup> The normal rules for criminal liability (as well as accomplice liability, incitement, and conspiracy)<sup>272</sup> could be applied in these cases and the common purpose doctrine is rendered quite superfluous in the aforementioned circumstances.

In *Coetzee*, Sachs J (per separate judgment), also emphasised the importance of the presumption of innocence and that the State’s burden cannot be relieved due to the serious nature of the crime.<sup>273</sup> If regard had to be given to the nature of the crime, the presumption of innocence would merely be a vestige in a sea of serious offences which are rife in South Africa. Furthermore, the public interest in protecting innocent persons from being convicted, outweighs the bringing of a specific accused to justice.<sup>274</sup> Thus, the “societal interest” in convicting those who act in concert should not alleviate the State’s onus in proving all of the elements with reference to *each accused* beyond a reasonable doubt. This is, after all, what one should expect from a mode of liability in the strict sense of the word.

Moseneke J ultimately concluded that no constitutional rights (especially arbitrary deprivation of freedom) are violated through the application of the common purpose doctrine in its current form.<sup>275</sup> The learned Justice submits, unconvincingly, that this departure from the traditional approach to criminal liability is justified because of the difficulties in prosecuting group-based crimes.<sup>276</sup> This pragmatic approach is, however, not an adequate justification for the deviation from the fundamental principles of criminal law, specifically the principles regarding modes of liability premised on the fundamental notion of individual (not collective) guilt. This objection, in a word, is a doctrinal objection.

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<sup>270</sup> Grant (2014) *South African Journal of Human Rights* 16.

<sup>271</sup> Grant (2014) *South African Journal of Human Rights* 16.

<sup>272</sup> Grant (2014) *South African Journal of Human Rights* 17.

<sup>273</sup> See *Coetzee* para 220.

<sup>274</sup> See *Coetzee* para 220. Also see SE van der Merwe “A basic introduction to criminal procedure” in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 3 20-21.

<sup>275</sup> *Thebus* para 40.

<sup>276</sup> *Thebus* para 34.

### 3 3 4 2      *Doctrinal issues*

The criticism directed at the common purpose doctrine essentially boils down to a concern about the far-reaching application of the doctrine. That is, the doctrine of common purpose holds the risk of removing criminal liability too far from the fundamental notion of individual guilt. It is a question of where to draw the line so that “JCE” – *joint criminal enterprise* – does not become “JCE” – *just convict everyone*. This is especially true of the doctrine in its active association form. The problems associated with this manifestation of the doctrine were highlighted in *Mzwempi*. There, Alkema J criticised the Appellate Division’s interpretation and application of the doctrine in its active association form in *S v Nzo and Another* (“Nzo”)<sup>277</sup> and stated that *Nzo* should not be considered as authoritative case law on the extended scope of the doctrine. This judgment in fact laid down principles in direct conflict with the Court’s previous judgment in *Mgedezi* (which carries constitutional affirmation) – which was delivered just one year prior to *Nzo*.

The most pertinent facts of *Nzo* deserve brief mentioning. The victim, Mrs Tshiwula, threatened to expose her husband’s harbouring of members of an alleged ANC terrorist group to the police. The first appellant, who was one of the harboured parties, reported this threat to one Joe who in turn threatened to kill Mrs Tshiwula. The first appellant overheard this threat to Mrs Tshiwula’s life. Three weeks after this threat was uttered, Joe in fact did murder Mrs Tshiwula. The Court held that it could not find the parties guilty as co-perpetrators because neither of them had physically executed the murderous act.<sup>278</sup> They could also not be found guilty for the murder on the basis of common purpose. The court *a quo*, however, found both the appellants<sup>279</sup> guilty of murder on the basis of the common purpose doctrine through another avenue. The court *a quo* justified this by stating that the appellants were legally responsible for Mrs Tshiwula’s death because “the murder had been foreseen by the appellants and since they had associated themselves with and persisted in furthering the common design despite such foresight [...]”.<sup>280</sup> According to the court *a quo*, the terrorists, in their acts of sabotage had to foresee that in the execution of their activities (which involved the

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<sup>277</sup> 1990 (3) SA 1 (A).

<sup>278</sup> See *Nzo* 3-4.

<sup>279</sup> Appellant 1 shall be the focus of this discussion.

<sup>280</sup> *Nzo* 4.

use of explosives) could lead to a fatality.<sup>281</sup> To bolster this line of reasoning even further, that Court refers to certain ANC pamphlets that labelled parties who had turned as State witnesses as traitors and were threatened with their lives and that action would be taken against them before these disclosures were made instead of after. This all led to the reasonable conclusion that the type of exposure Mrs Tshiwula spoke of would be met with her death – in other words a foreseen possibility.<sup>282</sup> Hefer AR consequently found that the appellants were liable, especially under the dictum in *S v Madlala* (“*Madlala*”).<sup>283</sup> This is due to their continued “participation in the execution of the common design, despite their foresight of the possibility of murder (...)”.<sup>284</sup>

The Court in *Mzwempi* correctly doubts whether this “extended liability” in *Nzo* has found any application in South African criminal law. It was pointed out that *Nzo* has not been used as authority in any cases, except on the matter of disassociation.<sup>285</sup> Alkema J illustrated why *Nzo* has “far reaching and profound implications” and is destructive to the principles laid down in *Safatsa* and *Mgedezi*.<sup>286</sup> The Court additionally criticised *Nzo*’s rejection of the appellant’s contentions relating to the imputation a collective intention to all the accused parties, rather than focusing on a particular accused’s specific intention with regards to a particular crime.<sup>287</sup> Alkema J found that this was especially in conflict with the principles of *Safatsa* and *Mgedezi* and their subsequent approval by the Constitutional Court. It was furthermore shown that except for intention (in the form of *dolus eventualis*) the factual scenario in *Nzo* did not comply with the Appellate Division’s (own) other requirements as per *Mgedezi*.<sup>288</sup> The appellant, for example, was not even at the scene of the unlawful act or even aware of this. There was also no *overt* act of association to manifest the shared

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<sup>281</sup> *Nzo* 4.

<sup>282</sup> Also see *Nzo* 6 where the Court states that “evidence overwhelmingly points to her being killed in order to silence her (...)”.

<sup>283</sup> 1969 (3) 637 (A) at 642. The Court stated their liability could arise if “[the accused] a party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred (...)”.

<sup>284</sup> *Nzo* 7.

<sup>285</sup> *Mzwempi* para 96.

<sup>286</sup> *Mzwempi* para 106 and then 107-112 for the crux of his contentions.

<sup>287</sup> *Mzwempi* para 109 referring to *Nzo* at 7.

<sup>288</sup> Also see JM Burchell “*S v Nzo* 1990 (3) SA (A) – Common Purpose Liability” (1990) 3 *South African Journal of Criminal Justice* 345 348-349.

common cause with the actual perpetrator. There was also no proof of an intention to make common cause with Mrs Tshiwula's murderer. All that was and could be proven is the general intention to share in the campaign of the specific ANC cell – which was not proven to include the murder of Mrs Tshiwula.<sup>289</sup> There was no mention of an act of association, presence at the scene or knowledge of the crime. In fact, there was no mention of the *Mgedezi* requirements or *Safatsa*.<sup>290</sup> These judgments are however mentioned by Steyn JA in his dissenting judgment.

Another logical consequence of the extended liability in *Nzo* is that it leaves open the possibility of imputing criminal liability to each person involved in an unlawful activity or, like in *Nzo*, members of an armed struggle.<sup>291</sup>

Let us take a contemporary example to illustrate the pitfalls of the common purpose doctrine, especially when applied in the context of collective conduct and the fluid association of people in a free society. The *#FeesMustFall* Movement arose in 2015 mainly as a nationwide response by the collective body of university students in South Africa to protest the Minister of Higher Education's announcement of a university fee increase of 8%, which was deemed unaffordable. Despite the seemingly legitimate aims of the movement, it is the case that *#FeesMustFall* often involved instances of unlawful protests, property damage, violence, the disruption of university activities and

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<sup>289</sup> See Burchell (1990) *South African Journal of Criminal Justice* 349 where the author states that "(...) subscribing to the overarching policies of an organisation is not and should not be sufficient to link members (such as the appellants in this case) to the specific murder committed by another member (...)."

<sup>290</sup> *Mgedezi* para 90.

<sup>291</sup> See *Mzwempi* para 111.

even death.<sup>292</sup> Insofar as the #FeesMustFall movement shared a common goal and a shared *modus operandi*, and insofar as one can potentially apply the logic of South African case law relating to the common purpose doctrine, it is arguably not too far-fetched to see the possibility (if not probability) of a creative prosecutor linking leading figures in the #FeesMustFall movement to a common plan, thus applying a mode of liability originally meant to be based on a much closer association towards a criminal outcome. Say for instance that a group of protesting students at Nelson Mandela Metropolitan University<sup>293</sup> was charged with malicious damage to campus property, threatening students and stoning the police. Could liability be imputed not only to anyone involved at that campus but also campuses in other provinces, such as the University of Stellenbosch or the University of Johannesburg as well, based on the rationale in *Nzo*?

It was clear from the reasoning in *Nzo* that a common design between persons of an organisation (where one or more of the objectives is unlawful) and where foreseeability of unlawful consequences is present and there is a persistence in the furtherance of the common design, may result in criminal liability. Towards the climax of the #FeesMustFall protests, one could perhaps have made the argument that there

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<sup>292</sup> #FeesMustFall shall also be utilised as an example in Chapters 4 and 5. The #FeesMustFall Movement must however be further contextualised. This movement must be understood in the particular political climate in which occurred. During the same year, the #RhodesMustFall movement emerged in a call by students of the University of Cape Town students to have the statue of Cecil Rhodes removed from the campus grounds, as he represented South Africa's colonial past. Students of the University of the Free State joined by creating their own hashtags, namely #SwartMustFall and #SteynMustFall – which called for the removal of former President of the Republic of South Africa, CR Swart and MT Steyn who was the President of the Orange Free State. Furthermore, the controversial “Luister” (Contraband Cape Town “Luister (video)” (20-08-2015) *YouTube* <<https://www.youtube.com/watch?v=sF3rTBQTQk4>> (accessed 01-12-2017)) documentary was released in which Black and Coloured students shared their experiences dealing with racism and segregation at Stellenbosch. See T Luescher, L Loader & T Mugume “#FeesMustFall: An Internet-Age Student Movement in South Africa and the Case of the University of the Free State” (2017) 44(2) *Politikon* 231 235-240; *Hotz and Others v University of Cape Town* 2017 (7) BCLR 815 (CC) para 1; *Concerned Association of Parents and Others for Tertiary Education at Universities v Nelson Mandela Metropolitan University and Another* ECC 10-11-2016 case no. 4976/2016 (“*Concerned Parents*”) paras 5-6; J Duncan “Opinion: Why Student Protests in SA Have Turned Violent (30-09-2016) *EWN* <<http://ewn.co.za/2016/09/30/OPINION-Why-student-protests-in-South-Africa-have-turned-violent>> (accessed 01-12-2017).

<sup>293</sup> As per the facts in *Concerned Parents* para 7.



was reasonable foreseeability that at least one of the objectives, by at least some of the members, was unlawful, despite the legitimacy of the underlying cause.

The reasoning in *Nzo* could equally hold true for gang activity. Known gang members (or those who were merely unlucky enough to be apprehended) could be prosecuted for the crimes committed by unknown gang members but could successfully be linked to a particular gang. For example, where a leader of a particular gang is shot by a rival gang<sup>294</sup> (and such a fact can be established on the evidence), criminal liability may potentially ensue for any member of said gang if certain “elements” are proven (gang members share an unlawful common design; foreseeability of unlawful consequences as well as persistence in the furtherance of the common design). But of course, *Nzo* is not the end of the analysis.

In *Mzwempi*, Alkema J made a constitutional argument on the basis of equality. It was contended that persons could either incur or escape liability, depending on whether a court follows a *Mgedezi-Safatsa* approach or follows *Nzo*. The latter approach does not carry Constitutional approval (although it is submitted here that *Thebus* is based on equally unsteady constitutional grounds). Alkema J did however concede that *Nzo* was decided before the constitutional era.<sup>295</sup> Legal uncertainty might additionally arise when a factual scenario is broad enough to fall within the scope of *Nzo* – such as *Mzwempi*.<sup>296</sup>

Hector finds Alkema J’s characterisation of the factual scenario in *Nzo* as active association doubtful; it is according to Hector rather a matter of prior agreement. Consequently, the Court’s apprehension over the applicability of the *Nzo* to the case was thus not warranted.<sup>297</sup> Burchell submits that the situation is a “hybrid”.<sup>298</sup> It was hybrid in the sense that there was a prior agreement to commit a range or series of terroristic acts and secondly, there was alleged active association to commit the murder. This approach, on the facts, is the correct one and better encapsulates the

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<sup>294</sup> A Hyman “‘Gang war’ fears in Cape Town as six shot after failed Donkie Booysen hit” (03-08-2018) *TimesLive* <<https://www.timeslive.co.za/news/south-africa/2018-08-03-gang-war-fears-in-cape-town-as-six-shot-after-failed-donkie-booyesen-hit/>> (accessed 22-10-2018).

<sup>295</sup> *Mzwempi* para 113.

<sup>296</sup> Even though no reported cases have been found applying *Nzo* in this fashion.

<sup>297</sup> See S Hector “The state of common purpose liability in South Africa – *S v Mzwempi* [2011] ZAECHMHC 5, 2011 (2) SACR 237” *Journal of Commonwealth Criminal law* (2012) 180 187.

<sup>298</sup> Burchell *Principles* 478-479.



problems in both *Nzo* and *Mzwempi*: the fact that the vexed crimes fell outside the scope of the prior agreement or mandate of the group. There are practical differences in the groups in both *Nzo* and *Mzwempi* and other instances of common purpose. The membership consisted of large numbers of people who acted fairly autonomously and were evenly distributed across the country, such as in *Nzo*'s case. These groups should be differentiated from the more common example of a small group of persons acting in concert to commit a crime.<sup>299</sup> The small group will more likely have a singular intention while undesired and unfair consequences could be attached in the context of a larger group.

The *#FeesMustFall* example is admittedly provocative; it mixes good and bad apples and muddies the waters. But it goes to show that where an identifiable group, however amorphous its membership may seem, is associated with some criminal conduct (some of it even very high-profile, such as the destruction of university property and burning of books) the temptation is there to employ a mode of criminal liability primarily designed for collective criminality. Dogmatic and constitutional factors, as outlined above, together with the exercise of sensible prosecutorial discretion, should safeguard against an abuse of the common purpose doctrine in the context of politically sensitive and broadly sympathetic cases emanating from collectivities such as the *#FeesMustFall* movement. But if one takes the political and popular elements out of the equation, if one would only focus on criminal conduct associated with large and relatively stable groups which share the same broad goals (mega-gangs, for instance), then one is still left with the same doctrinal and constitutional issues discussed up to this point. Hence the apparent rationale to take legislative action in an attempt to focus the criminal justice response to address a particular problem (gangs) and to try and circumvent the pitfalls presented by a mode of liability (common purpose doctrine) which clearly carries a lot of historical, doctrinal and constitutional baggage. But we will return to POCA. Before we do that, it is necessary to fully engage with the common law principles to see if there are any redeeming factors or useful features which could either meaningfully complement POCA Chapter 4, or even make that piece of legislation superfluous.

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<sup>299</sup> See Burchell *Principles* 478 where the author draws attention to this important distinction.

So, a more restrictive interpretation of the active association aspect of common purpose was demonstrated recently in *Dewnath v S* (“*Dewnath*”).<sup>300</sup> In *Dewnath*, the appellant and his parents orchestrated the murder of the appellant’s sibling through a contract killer. The hitman eventually executed this task but in the course of the crime also attempted to kill the deceased’s wife. The appellant, together with his parents, were all convicted on the basis of common purpose for the murder of the deceased and only the parents were convicted of the attempted murder of the wife.<sup>301</sup> Only the appellant received special leave to appeal and the crux of his contention was that there was insufficient evidence to link him to the murderous plot through common purpose in its active association form. The main question before the court was whether there was sufficient evidence linking the accused to the common purpose and furthermore that he had acted with the requisite *mens rea*.

It was argued that the appellant was not involved in the negotiation process and that the main link between the crime and the appellant was the following words:

But why are you asking for so much money? The person that we are asking you to kill is absolutely worthless. I would understand if he was a member of the taxi business. If I wasn’t involved in the police, with the police, I would kill him myself.<sup>302</sup>

It was additionally argued on behalf of the appellant that even if these words did create a sufficient connection to the murderous enterprise that there was “insufficient proximity with the final result” to justify the conviction.<sup>303</sup>

The court pointed out that “the most critical requirement of active association is to curb too wide a liability”.<sup>304</sup> It further submitted that the principles in *Mgedezi* had received constitutional approval and served a dual purpose. It firstly ensures that there is a sufficient proximity between the conduct establishing the active association and the result. This active association must secondly be significant and not insufficient participation removed from actual execution.<sup>305</sup> The SCA ultimately decided that the appellant’s participation was insignificant, limited and too far removed from the actual

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<sup>300</sup> SCA 17-04-2014 case no 269/13.

<sup>301</sup> The facts appear from *Dewnath* paras 1-6 of the judgment.

<sup>302</sup> *Dewnath* para 5.

<sup>303</sup> *Dewnath* para 14.

<sup>304</sup> *Dewnath* para 15.

<sup>305</sup> *Dewnath* para 15. Also see Van der Merwe (2017) *Criminal Justice Review* 6.

execution of the unlawful acts. There were furthermore no grounds to conclude that there was any intention to kill the deceased.<sup>306</sup>

*Dewnath* illustrates a strict and proper interpretation of the requirements in *Mgedezi*. Steyn JA in his dissenting judgment in *Nzo* also stated that common purpose was originally based on the so-called doctrine of proximity, requiring both factual and legal proximity to the crime before liability may be imputed.<sup>307</sup> This appropriately restricts the application of the doctrine which does not lead to theoretical irrationalities like in *Nzo*. The SCA and Constitutional Court have yet to make any direct pronouncements about the extended scope of the doctrine as per *Nzo*.

The AD also offered some further limitation in *S v Goosen* (“*Goosen*”).<sup>308</sup> Van Heerden JA set out the principle that there will be no common purpose liability for an accused where there is a substantial deviation in the causal chain of events postulated by the accused where there is a reliance on *dolus eventualis* by the State.<sup>309</sup> The application of this rule, it would appear, is limited to very exceptional circumstances, such as in the case of *Goosen* where the accused was below average intelligence and could not properly postulate all the likely outcomes of his actions or where the unlawful consequence occurred in a “truly freakish” fashion.<sup>310</sup> This rule is similar to the fundamental difference rule in terms of JCE in the United Kingdom.<sup>311</sup> The South African rule seems to be extremely limited in scope while the fundamental difference rule has a broader, more flexible application.

The prudent thing to do is indeed that judges should opt for a limited rather than an expansive view of active association as an element of common purpose. When dealing with cases of active association, the association must be with specific conduct in order to qualify as the requisite *actus reus* and not “association with the general design” of an organized group.<sup>312</sup> These sentiments were also echoed by the SCA in *Toya-Lee van Wyk v The State* SCA 28-03-2013 case no 575/11 (“*Van Wyk*”) where Pillay JA held that

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<sup>306</sup> *Dewnath* paras 16-17.

<sup>307</sup> *Nzo* 16.

<sup>308</sup> 1989 (4) SA 1013.

<sup>309</sup> *Goosen* at 1026. Also see Kemp et al *Criminal Law* 230-231.

<sup>310</sup> Kemp et al *Criminal Law* 212.

<sup>311</sup> See 3 3 6 1 2 below.

<sup>312</sup> See *Mzwempi* paras 108-109.

(...) care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group.<sup>313</sup>

The Appellate Division in *Mgedezi*,<sup>314</sup> and the SCA in *Van Wyk, Dewnath* as well as *S v Le Roux and others* (“*Le Roux*”)<sup>315</sup> emphasised a court’s responsibility in determining the liability of each participant to a group-based criminal enterprise and thus avoiding situations of guilt merely by association. This seems to be more in line with the core or origins of the common purpose doctrine.

A recent judicial development of the doctrine of joint criminal enterprise (“JCE”) by the Supreme Court of the United Kingdom and Judicial Committee of the Privy Council will be referred to below<sup>316</sup> in order to further bolster this proposed limitation of liability. In turn, JCE under international criminal law will also be considered in order to detect trends, pitfalls and limitations in the context of group-based modes of liability.

### 3 3 5 *Interaction between POCA and the common purpose doctrine*

There are several instances and scenarios where application of the common purpose doctrine and Chapter 4 of POCA would overlap. Scenarios, however, in which there is a (once-off) active association should not be utilised for the purposes of Chapter 4 of POCA. A strict interpretation of POCA requires an *ongoing* structure which would naturally exclude instances where groups formed sporadically or on an *ad hoc* basis.

In considering the application of the common purpose doctrine or Chapter 4 of POCA, four factual matrixes can be identified. *Firstly*: where the members of a criminal gang agree to commit an offence and eventually do execute that offence then they may all be held liable for that offence in terms of the common purpose doctrine. The State may elect not to pursue a prosecution in terms of Chapter 4. This could be due

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<sup>313</sup> *Van Wyk* para 16. Also see *Gubuza v State* WCC 04-03-2014 case no 511/2013 paras 18-21.

<sup>314</sup> “A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions *en masse*.” (*Mgedezi* at 703).

<sup>315</sup> 2010 (2) SACR 11 (SCA). The Court in *Le Roux* at para 17 warned against an “all-embracing” determination of guilt of multiple accused persons involved in one criminal enterprise based on the principles in *Mgedezi*.

<sup>316</sup> See below especially 3 3 6 1 3.

to several reasons, including the lack of evidence to prove the existence of such a criminal gang or insufficient crimes to form the required pattern of criminal gang activities or simply to expedite the proceedings. *Secondly*: The State may use the underlying offence(s) committed by the gang as a predicate offence in terms of Chapter 4. Where the gang, for example, commits arson, they could be held liable in terms of the common purpose doctrine for the arson and then *subsequently* be held liable for one of the offences in Chapter 4 where the arson is used as a predicate offence. *Thirdly*: The State could also, where there is sufficient evidence of each individual's causal contribution to the crime, not rely on the common purpose doctrine and merely charge the gang with a relevant offence in terms of Chapter 4. *Finally*: a court may also, in terms of section 10(3) of POCA, use the fact that an accused was a member of a criminal gang at the time of the commission of the offence, as an aggravating factor at the sentencing stage. This appears to be popular in the evolving and germinal practice surrounding criminal gang prosecutions. Section 10(3) was, for example, applied to a vast number of offences, to almost each of the nineteen co-accused in *S v Thomas* ("*Thomas*").<sup>317</sup>

As mentioned above, the value of legislating against criminal gang activities becomes apparent when one considers the difficulties in prosecuting larger groups where certain persons may act outside of the scope of the alleged mandate or common design. Chapter 4 of POCA does not *impute* liability as with the common purpose doctrine. Thus, merely because A, B and C are all members of gang Z, does not mean that they will all be held liable for the unlawful actions of C unless they causally contributed to said action. Section 9(1)(a) (read with the definitions in section 1), for example, will only be applicable if the accused is an active participant or member of a criminal gang *and* will only be held liable if he or she "wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang". The predicate acts of fellow gang members may however be imputed to one another to satisfy the requisite *pattern* of criminal gang activities.

It can be noted that that section 9(1)(a) (read with the definitions in section 1) contains a situation comparable with the common purpose doctrine. To be held liable

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<sup>317</sup> 2015 JDR 1932 (WCC). Section 10(3) is however constitutionally suspect, due to the fact that it may be punishing mere gang membership without an accompanying gang-related act thus offending an accused person's freedom of association in terms of section 18 of the Constitution.

under POCA Chapter 4, an accused must either be an *active participant* in or a member of a criminal gang, coupled with the relevant crimes under sections 9 or sentence enhancements under section 10. It is however clear that these forms of active participation differ greatly. POCA requires active association in a general sense rather than with a specific crime, which is apparent from the phrase “(...) actively participates in (...) a criminal gang”.<sup>318</sup> A person who has participated in criminal gang activities once should therefore not be held liable under POCA but could well be held liable under the common purpose doctrine – probably in terms of prior agreement (his *membership* to the gang).

Active participation under POCA appears to be a quantitative rather than a qualitative issue (save for the sentence enhancements as described above). A court would have to quantify the activities of a particular accused in the relevant gang (through participating in a “pattern of criminal gang activities”) rather than evaluate their qualitative involvement in a particular crime (how much he or she contributed to a crime). The definition of a “pattern of criminal gang activities” requires a person to have committed at least two offences in Schedule 1, no matter how minute their involvement was. A court will, conversely, have to evaluate an accused’s qualitative involvement in a common purpose scheme. The latter issue is the crux of the court’s consideration in determining common purpose liability in the active association form. This was also the approach followed by Californian Courts applying STEP.<sup>319</sup> STEP has however been challenged several times on the alleged vagueness of the term “active participation”.<sup>320</sup> The California Supreme Court however has rejected the interpretation<sup>321</sup> that an accused, to qualify as an active participant, must dedicate a substantial amount of time to the criminal gang and held that all that is required is for the State to show that a defendant’s participation has been “more than nominal or passive”.<sup>322</sup> This position is also vague and uncertain.

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<sup>318</sup> Section 9(1) of POCA.

<sup>319</sup> See *People v. Green* 278 Cal.Rptr. 140 (1991) (“*Green*”).

<sup>320</sup> See 5 3 2 4 1 1 below.

<sup>321</sup> See *People v. Castenada* 97 Cal.Rptr.2d 906 (2000) (“*Castenada*”) for the conclusion on this saga of cases as well as Chapter 4 below.

<sup>322</sup> *Castenada* 909. See Chapter 5 3 2 4 1 1 below for a discussion on the constitutionality of this provision in the US context and Chapter 4 for a discussion on its practical implementation.

It is submitted that POCA Chapter 4 does not render the common purpose doctrine obsolete, even in the context of group-based criminal activities. To be clear, the common purpose doctrine is a general mode of liability, so it has an existence in general principles of criminal law, whereas POCA creates specific offences (racketeering, money laundering and criminal gang activities). The question is whether the scope and utility of the common purpose doctrine is such that it makes redundant the offences created in POCA Chapter 4. There are distinct scenarios where only one would be applicable but also areas of great overlap. The common purpose doctrine is more desirable from a crime control perspective due to its potentially broad and relative elastic nature and relatively simple requirements – which are especially effective in the *prosecution of ad hoc* criminal groups. A prosecutor may therefore find the common purpose doctrine more desirable compared to the complex web of requirements that Chapter 4 (read with Chapter 1) of POCA requires.

The common purpose doctrine however appears to lack the inherent ability to act as a *deterrent* to prevent people from engaging in criminal gang activities in the first place.<sup>323</sup> The doctrine also poses a great risk of including fringe or even innocent parties within its ambit. This is also true when one considers the directory nature of the requirements in POCA.

### 3 3 6 *Foreign law and international law*

#### 3 3 6 1 *The doctrine of joint criminal enterprise in England*<sup>324</sup>

##### 3 3 6 1 1 *Introduction*

Considering the fact that the South African manifestation of the common purpose doctrine originates from English law, it becomes useful to analyse this doctrine as interpreted by English courts. The South African common purpose doctrine has however developed a rich and independent body of case law interpreting and applying this doctrine and, at least in its modern application, has not been influenced greatly by

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<sup>323</sup> See House of Commons Justice Committee *Joint Enterprise: Eleventh Report of Session 2010–12* (2012) at paras 32–33 where the Committee suggested that there was no definitive evidence that joint criminal enterprise served as a deterrent for gang-related offences.

<sup>324</sup> Lords Hughes and Toulson in *Jogee* show disfavour in the term “joint enterprise liability” and stat it has caused “public misunderstanding” and has been interpreted as a form of “guilt by association or of guilt by mere presence” (see *Jogee* para 77). The term parasitic accessorial liability is preferred.



English judgments. It must also be differentiated from joint criminal enterprise which developed in terms of customary international law and as applied by international tribunals.

### **3 3 6 1 2      *General principles***

The doctrine of joint criminal enterprise (“JCE”), just as the common purpose doctrine, will hold each of the participants to agreed joint criminal venture criminally liable, if those acts fall within their common design.<sup>325</sup> Previously and also analogous with the common purpose doctrine is the fact that participants to this joint enterprise could also be held liable for acts that fall outside of the ambit of the common design provided that the participant(s) had the requisite *mens rea*.<sup>326</sup> This was the case until 2016 and it would have been sufficient in these cases for the Prosecution to prove that the participant possessed *dolus eventualis*. This situation has however significantly changed.

Prior to 2016, the principles relating to joint enterprise as applied in England and other common law jurisdictions were established in *Chan Wing-siu v. R.* (“*Chan*”).<sup>327</sup> In *Chan*, the Privy Council held that unlawful acts committed by a principal offender to a joint enterprise will be imputed to the secondary party in situations where the secondary party foresaw the possibility of the unlawful act but did not necessarily possess the requisite intent it.<sup>328</sup> The criminal liability thus arises from participating in such a criminal joint venture with the aforementioned foresight. This approach necessarily laid down the principle that where Accused Y and Z agree to commit the crime of robbery and during the execution of that robbery Accused Y murders someone, Accused Z would also be held liable for murder if he foresaw the possibility of his accomplice committing such an act, irrespective of his own intention relating to the crime of murder. This seems to be analogous to the South African position, and even more so under *Nzo*.

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<sup>325</sup> B Mitchell “Participating in Homicide” in A Reed & M Bohlander (eds) *Participation in Crime – Domestic and Comparative Perspectives* (2013) 7 9.

<sup>326</sup> Mitchell “Participating in Homicide” in *Participation in Crime* 9.

<sup>327</sup> [1985] A.C. 168.

<sup>328</sup> *Chan* 175.



Parties who have engaged in a joint criminal enterprise may receive some limitation to their liability in terms of the *fundamental difference rule*.<sup>329</sup> This rule applies in cases where the principal offender in the joint enterprise has fundamentally deviated from the original enterprise; acted outside the scope of the criminal scheme or there has been a fundamental departure “from the assumptions of the other parties to the offence”.<sup>330</sup> This typically occurs when the principal offender uses a different weapon to which the co-offender anticipated or when a fundamentally different or unexpected offence is committed.<sup>331</sup> Wilson and Ormerod point out that this rule will only apply where there is a “substantial variation” from the enterprise where this deviation converts the criminal enterprise into “a different kind of enterprise” than envisioned by the co-offender.<sup>332</sup> Thus, where X assists Z in his plot to assault A with a cricket bat, X would still be liable if Z uses a different but similar weapon such as a baseball bat. X could however escape liability where Z plots to use a cricket bat in an act of assault but during the attack uses a gun and murders A.<sup>333</sup> The rationale for this rule is succinctly described by Simester.<sup>334</sup> When a co-offender joins a joint criminal enterprise, he or she accepts liability for criminal deeds committed in pursuance of the common purpose.<sup>335</sup> This acceptance also extends to liability for incidental offences committed in the joint pursuance and where the offender is no longer in control of the outcome as the principal offender is an autonomous agent. This liability should however not extend to offences not foreseen by the co-offender or radically depart from the common purpose or enterprise.<sup>336</sup>

It must be noted in cases where it can be proven who delivered the fatal blow in a joint enterprise, the other parties will not be held liable as perpetrators but as

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<sup>329</sup> Mitchell “Participating in Homicide” in *Participation in Crime* 11; R Buxton “Jogee: upheaval in secondary liability for murder” (2016) 5 *Criminal Law Review* 324 326-327.

<sup>330</sup> Buxton (2016) *Criminal Law Review* 326-327

<sup>331</sup> Mitchell “Participating in Homicide” in *Participation in Crime* 11-12.

<sup>332</sup> W Wilson & D Ormerod “Simply harsh to fairly simple: joint enterprise reform” (2015) *Criminal Law Review* 3 14-15.

<sup>333</sup> Mitchell “Participating in Homicide” in *Participation in Crime* 11; Wilson & Ormerod (2015) *Criminal Law Review* 3 14-15.

<sup>334</sup> AP Simester “The Mental Element in Complicity” (2006) *Law Quarterly Review* 578 599. See also The Law Commission *Participating in Crime* (2007) para 3.52-3.53, where the Law Commission refers and agrees to this argument by Simester.

<sup>335</sup> This links with the principles of free will and self-determination as described above at 3 3 2.

<sup>336</sup> Simester (2006) *Law Quarterly Review* 599.

accessories. This is not the case in South African law. All parties held liable in terms of the common purpose doctrine will be held liable as co-perpetrators.

### **3 3 6 1 3      *Judicial intervention***

The judicial intervention, which will be discussed below, was only the apex of an ongoing concern about JCE. This concern was expressed in reports by the Law Commission (England and Wales)<sup>337</sup> and also manifested in national campaign groups<sup>338</sup> as well as criticism from the academic sphere due to the perceived overbroad application of the doctrine.<sup>339</sup> Empirical research by Mitchell and Roberts has indicated that there was a strong public disfavour for the doctrine of joint criminal enterprise and the associated sentencing.<sup>340</sup> The crux of the perceived unfairness lies in the reduced level of *mens rea* required to secure a conviction as well as the mandatory life sentencing rules. Mitchell points out that “[l]ittle more than evidence of association” (such as gang membership) is required in joint enterprise cases.<sup>341</sup> The Director of Public Prosecutions of England and Wales also acknowledges the

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<sup>337</sup> These reports include: The Law Commission *Inchoate Liability for Assisting and Encouraging Crime* (2007) as well as The Law Commission *Participating in Crime* (2007).

<sup>338</sup> See Wilson & Ormerod (2015) *Criminal Law Review* 3 fn 88 where the author refers to groups such as the Committee on the Reform of Joint Enterprise and the Joint Enterprise Not Guilty by Association (or “JENGbA”).

<sup>339</sup> Wilson & Ormerod (2015) *Criminal Law Review* 19.

<sup>340</sup> See B Mitchell & JV Roberts *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales* (2010) 37-39. The respondents were provided with two “typical” hypothetical joint enterprise scenarios. In Case A, Jim and Steve started to fight. During this fight, Jim revealed a knife and stabbed Steve to death. Pete stood at the sidelines and encouraged this criminal act. In Case B, Mike and Bob decided to rob a bank. Although Bob only drove the getaway vehicle, he knew that Mike had a loaded gun. Only Mike went in to commit the act of robbery, consequently shooting a cashier who activated an alarm. Only 21% agreed that the co-offender should be liable for murder in Case A while 22% agreed that the co-offender should be liable for murder in Case B. 58% of the respondents agreed that in Case A, the co-offender should be liable for manslaughter while only 41% believed that the co-offender in Case B should be held liable for manslaughter. 21% of the respondents felt that there should be no liability for either murder or manslaughter in Case A while 37% felt that there should be no liability for either murder or manslaughter.

<sup>341</sup> Mitchell “Participating in Homicide” in *Participation in Crime* 11.

disproportionate and unfair sentencing associated with joint criminal enterprise in scenarios where the co-offender had a relatively insignificant role.<sup>342</sup>

In *R v Jogee* (“*Jogee*”),<sup>343</sup> in a joint decision by the United Kingdom Supreme Court and the Privy Council, the scope of the joint enterprise doctrine was narrowed by holding that the principles established by the Privy Council in *Chan* could not be upheld and have been applied incorrectly over the past few decades.

The Court in *Jogee* based its decision on several important considerations, are extremely useful to consider in the broader context of the development of the common purpose doctrine in South Africa. *Jogee* pointed out that the Privy Council in *Chan* decided the case on the supposition that its authority established rules regarding the establishment of joint responsibility and more importantly what type of *mens rea* would be sufficient in such cases.<sup>344</sup> Lord Hughes and Lord Toulson went on to state that the Privy Council conflated *foresight* and *authorisation*.<sup>345</sup> Authorisation denotes a situation where two persons agree to commit a crime and under certain circumstances, one or both would be authorised to commit other “collateral” offences (and usually more serious) offences. For example, where two bank robbers only intend to commit the robbery but if they are met with resistance, they are authorised to use firearms. One can furthermore not automatically infer authorisation of those other collateral offences where there is a continued participation in the original criminal scheme and where foresight of those collateral offences is present.<sup>346</sup> It was furthermore accurately pointed out that the foresight of an unlawful consequence does not necessarily translate into an intention of desire to materialise but this may serve as (sometimes “powerful”) evidence of such an intention.<sup>347</sup>

A comment relevant to this discussion was made by Lords Hughes and Toulson. They refer to Lord Hutton’s comments in *R v Powell and R v English* (“*Powell and*

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<sup>342</sup> House of Commons Justice Committee *Joint Enterprise: Eleventh Report of Session 2010–12* (2012) 13. Also see Mitchell “Participating in Homicide” in *Participation in Crime* 12-13.

<sup>343</sup> [2016] UKSC 8.

<sup>344</sup> See *Jogee* para 64.

<sup>345</sup> *Jogee* para 65.

<sup>346</sup> *Jogee* para 66.

<sup>347</sup> *Jogee* para 66. Here the Court refers to the comments by Lord Brown in *R v Rahman* [2009] 1 AC 129. Also see *Jogee* para 73 where it was stated that “[f]oresight may be good evidence of intention but it is not synonymous with it (...)”, referring to the House of Lords decision in *R v Powell and R v English* [1999] 1 AC 1.

*English*)<sup>348</sup> in relation to public policy requiring effective means to address crimes committed by gangs.<sup>349</sup> The Lords however stated there was no evidence that the law pre-*Chan* was insufficient. This is a powerful statement, considering that the common purpose doctrine was largely constitutionally justified based on this reasoning.

The Lords ultimately rejected the principle as formulated in *Chan* and stated that “(...) the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments”.<sup>350</sup> The Court “prefers” the formulation as relied on in *R v Mendez* (“*Mendez*”) <sup>351</sup> favouring the application of the ordinary principles of secondary liability:

The only peculiarity of joint enterprise cases is that, once a common purpose to commit the offence in question is proved, there is no need to look for further evidence of assisting and encouraging. The act of combining to commit the offence satisfies these requirements of aiding and abetting. Frequently, it will be acts of encouragement which provide the evidence of the common purpose. It is simply necessary to apply the ordinary principles of secondary liability to the joint enterprise.<sup>352</sup>

In other words, where parties agree to commit unlawful acts, they will be held liable for acts for which they have given their express or implied assent and will also be liable where they commit these acts without prior agreement. The latter could occur via “support by words or deeds”.<sup>353</sup> These instances, on their own, are enough to evoke secondary liability based on the ordinary principles of criminal law and render the extended liability and consequently the principles in *Chan* superfluous.

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<sup>348</sup> [1999] 1 AC 1 25.

<sup>349</sup> *Jogee* para 75. Also see House of Commons Justice Committee *Joint Enterprise: Eleventh Report of Session 2010–12* (2012) paras 29-30. Submissions made to the Justice Committee pointed to public concerns relating to gang-related and group violence. It was posited that this public concern combined with the ambiguity and uncertainty surrounding the law, could lead to over-charging in gang-related crimes. The Justice Committee (at paras 32-33) stated that the welcomed further evidence to *prove* joint enterprise serves as a deterrent to potential gang-offenders. The Committee furthermore suggested that over-charging may deter witnesses from coming forward for fear of being charged due to their mere associating, thus “impeding the justice process”.

<sup>350</sup> See *Jogee* pas 76 and 79.

<sup>351</sup> [2011] QB 876.

<sup>352</sup> *Mendez* para 17 relying on JC Smith & B Hogan *Criminal Law* 12 ed (2008) 207.

<sup>353</sup> *Jogee* para 78. These statements are especially reminiscent of the facts in *Safatsa*.

The crux of the decision is that a secondary party must possess the same direct intent as the primary offender in order to be held liable where the primary party commits a criminal act contemplated by the secondary party but which did not fall under the scope of their common design.<sup>354</sup> Merely having foreseen an unlawful consequence is no longer sufficient.

*Jogee* highlights the dangers relating to group-based criminal liability under JCE and by extension the common purpose doctrine. In fact, if one looks at the genesis of the common purpose doctrine/JCE in English and South African law, it is clear that two forces have always been at work, moulding a mode of liability which sits rather uncomfortably within the general part of two modern criminal law systems. These two forces are, on the one hand, the pragmatic, and sometimes opportunistic prosecutorial need to deal with the reality of group-based criminality. On the other hand is the dogmatic and normative/constitutional considerations that restrict the scope of common purpose/JCE – not for the sake of it, but for the sake of fairness and an adherence to a principled approach to criminal liability which is (should be!) based on individual guilt in the true sense. But criminal law does not exist in a utopian dream world; it responds to the real world. So, if we can take as a preliminary conclusion that there is something to be said for common purpose/JCE as a mode of liability, it is perhaps useful to explore this proposition further with regards to JCE under international criminal law – a field *primarily* concerned with collective conduct and group-based criminality.

To be clear, again: it is the case that criminal gang activities are not (yet) crimes under international law. Modes of liability associated with international criminal law, such as command responsibility and JCE, can therefore not simply be applied to crimes under domestic criminal law. The discussion in the next section should therefore be seen as a theoretical exploration with an eye on possible lessons for the development of domestic criminal law principles.

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<sup>354</sup> *Jogee* para 90.

### 3 3 6 2 *JCE in international criminal law*

#### 3 3 6 2 1 *Introduction and rationale*<sup>355</sup>

The point of departure in determining liability under international criminal law is individual criminal liability, just as in most modern domestic legal systems. History has shown this to be extremely complex due to the fact that human rights atrocities and mass violations of international humanitarian law are, by their nature, often effectuated by groups or collective state action – usually in the form of military or quasi-military fashion.<sup>356</sup> The criminal contribution of each of these actors varies in intensity and proponents argue that liability should not be limited to the physical perpetrators.<sup>357</sup> These complexities do however not discharge the prosecuting body from proving individual criminal liability and each actor's contribution to the alleged crime.<sup>358</sup>

Because of the collective nature of crimes under international law, and in the absence of satisfactory modes of liability to address this, the doctrine of joint criminal enterprise (JCE) was first created at the international level by the judges of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In *Prosecutor v Tadić*<sup>359</sup> the ICTY Appeals Chamber highlighted the fact that criminal liability for violations of international humanitarian law cannot be limited to individual criminal liability but extends to other categories of joint offenders that do not meet the traditional elements of crimes.<sup>360</sup> The ICTY in fact noted that "[m]ost of the time these crimes do not result from the criminal propensity of single individuals" but rather groups of

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<sup>355</sup> The comparative nature of this dissertation was discussed above in Chapter 1 and will be contextualised further in Chapter 6. For the time being, it is important to point out that this type of comparative study is supported by the Constitution. Section 39(1)(b) specifically instructs forums, tribunals and courts to consider international law when interpreting the Bill of Rights. This section uses the word "must" and is therefore peremptory in nature. Section 39(2), which deals with the development of the common law and the interpretation of legislation, the aforementioned forums "*must* promote the spirit, purport and objects of the Bill of Rights" (own emphasis). The ensuing section deals with the development of the common law, in particular in the light of constitutional principles. It is therefore appropriate to rely on international law in this context.

<sup>356</sup> G Werle *Principles of International Criminal Law* (2009) 2 ed para 441.

<sup>357</sup> *Prosecutor v Tadić* IT-94-1-A (15 July 1999) para 192.

<sup>358</sup> G Werle *Principles of International Criminal Law* (2009) 2 ed para 441.

<sup>359</sup> IT-94-1-A (15 July 1999).

<sup>360</sup> *Tadić* para 189-190.

persons acting in concert in pursuance of their common design.<sup>361</sup> Cassese et al note the following:

To obscure responsibility in the fog of collective criminality and let the crimes go unpunished would be immoral and contrary to the general purpose of criminal law of protecting the community from deviant behaviour that causes serious damage to the general interest.<sup>362</sup>

This moral justification for the existence of JCE is substantially similar to the arguments of Moseneke J in *Thebus* in which he highlighted the societal need to hold those who act in concert responsible for their actions and also the societal distaste for group criminality.<sup>363</sup>

The doctrine of JCE as it known today was first formulated in *Tadić* where the ICTY identified three broad categories of common purpose. The ICTY signified a shift from an “objective” to a “subjective” determination of responsibility. An objective determination is said to take place where there is a factual determination as to whether the relevant accused has fulfilled at least one of the objective (or physical) elements of the crime. Only those who have contributed to the crime by fulfilling at least one of the objective elements will attract criminal liability. In contrast to this approach, the subjective approach looks as to whether the perpetrator in question has contributed to the commission of the crime through shared intent in the commission of the crime. Only those persons shall subsequently be regarded as principles to the crime.<sup>364</sup>

As noted, JCE, in its international context, is largely a judicial and prosecutorial innovation by the ICTY<sup>365</sup> (based on a series of post-World War II judgments). The subjective elements in each category differ and will be discussed below. The basic objective elements however remain the same for all three categories. There must firstly be a “plurality of persons”; secondly the existence a common purpose or design

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<sup>361</sup> *Tadić* para 191.

<sup>362</sup> A Cassese, MD Fan, V Thalmann, S Zappala “Amicus Curiae Brief of Professor Antonio Cassese and Members of The Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine” (2009) 20 *Criminal Law Forum* 289 301.

<sup>363</sup> *Thebus* para 34.

<sup>364</sup> *The Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04/ 01/06 (29 January 2007) (“*Dyilo* 2007”) paras 328-329.

<sup>365</sup> A Danner & JS Martinez “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” (2004) 93 *California Law Review* 75 103-104.



(which may be tacit or explicit) to commit a crime or crimes as per the ICTY Statute and thirdly there must be participation in one of the crimes in the ICTY Statute.<sup>366</sup>

It must be borne in mind that the categories of crimes that fall under the scope of the JCE doctrine in international law cover crimes that are international by nature, that is, crimes that offend the international community as a whole (genocide, war crimes and crimes against humanity).<sup>367</sup> But JCE did not develop only with respect to the nature of the crimes. It developed in the jurisprudence of the ICTY and subsequent tribunals because of the nature of criminal conduct committed by groups and collectives. It is for that reason that we need to explore the usefulness of the full spectrum of JCE for purposes of domestic and transnational forms of collective and complex criminality, such as organised crime and criminal gang activities. But first it is necessary to look at the various forms of JCE as developed under international criminal law and to compare that with the forms of common purpose and JCE that exist under domestic law, notably South African and English law, as earlier discussed.

### **3 3 6 2 2      *The three categories of JCE under international criminal law and the two models under article 25(3)(d) of the Statute of Rome***

The first category (also known as JCE I) relates to a situation where the co-perpetrators all possess the same intention while acting to fulfil the common design. In other words, the requisite *actus reus* is the voluntary participation through assistance or facilitation of a criminal offence with the same *mens rea* to bring about the criminal offence.<sup>368</sup> It is not necessary under this model that the co-accused personally bring about the unlawful consequence but they must at least, in some way, contribute to it in pursuance of their unlawful common design.<sup>369</sup> It should be obvious that JCE I corresponds to a large extent with the common purpose doctrine and JCE under South African and English criminal law.

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<sup>366</sup> *Tadić* para 227-228. Also see K Ambos “Joint Criminal Enterprise and Command Responsibility” (2007) 5 *Journal of International Criminal Justice* 159 167.

<sup>367</sup> See Also Ambos (2007) 5 *Journal of International Criminal Justice* 167.

<sup>368</sup> *Tadić* para 196.

<sup>369</sup> *Tadić* para 196. Nieto-Navia J (at para 197 and fn 233) refers to *Trial of Otto Sandrock and three others* British Military Court for the Trial of War Criminals (1945) UNWCC vol. I 35 where a British Court held three German co-perpetrators liable under the “common enterprise” doctrine. All three accused had the same intention of killing the deceased but had varying degrees of participation in executing their common enterprise.

The second category, JCE II, which is considered a variant<sup>370</sup> of the first category rather than a truly distinct form, relates to persons acting *ex officio* in the administrative or military hierarchy where they were accused of systematically mistreating prisoners or killing them during the execution of a common purpose or design. This category of cases is commonly referred to as “concentration camp” cases due to the fact that military and administrative staff in charge of the facilities were held liable under this category of the doctrine.<sup>371</sup> It is par excellence a model of JCE aimed at fixed institutional settings where crimes are committed due to the institutional setting itself. Three requirements must be satisfied before liability arises.<sup>372</sup> There must firstly be an organised system to facilitate the ill-treatment of prisoners or detainees and consequently execute the crimes in question. The accused must secondly possess awareness of the nature of the system of alleged ill-treatment. He or she must lastly have actively contributed or participated in the enforcement of the system to actualise the common criminal design.<sup>373</sup> It is doubtful that JCE II has much relevance as a mode of liability under domestic criminal law (that is, outside the specific context of institutional settings).

The third category, JCE III, also known as the “extended form” of the doctrine, holds persons who have participated in a common criminal plan liable for foreseen criminal actions committed by others – and where the conduct falls outside of the original common plan.<sup>374</sup> This category requires the parties to have the intention to participate in the common purpose or design and also to foresee (through, at least, *dolus eventualis*) that additional or unplanned criminal consequences may arise by participants to their common design.<sup>375</sup> The ICTY Appeals Chamber, in its final decision before the closing down of this ad hoc tribunal, in the case of *Prlic et al*,<sup>376</sup>

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<sup>370</sup> See *Tadić* para 203.

<sup>371</sup> *Tadić* para 202. See fn 249 where Nieto-Navia J refers to the British Military Court judgement in *Trial of Josef Kramer and 44 others* (1945) UNWCC vol. II 1 (“*Kramer*”). Also see S Manacorda & C Meloni “Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?” 9 (2011) *Journal of International Criminal Justice* 159 162.

<sup>372</sup> *Tadić* para 202 referring to *Karmer* 1.

<sup>373</sup> *Tadić* para 202.

<sup>374</sup> *Tadić* para 204; 218.

<sup>375</sup> See *Tadić* para 206; 220.

<sup>376</sup> *Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric & Berislav Pusic* IT-04-74-A (29 November 2017).

confirmed that JCE (including the extended form of the doctrine) forms part of customary international law. It was confirmed by the Appeals Chamber that the appellants were criminally responsible on the basis of the joint criminal enterprise for committing grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war and crimes against humanity. They were accordingly convicted pursuant to section 7(1) of the ICTY Statute. It was found that, although certain of the established crimes did not form part of the initial common criminal plan, the appellants were nevertheless responsible for a number of these crimes, pursuant to JCE III. The Appeals Chamber stated as follows:

[It] is the settled jurisprudence of the Tribunal that the three forms of JCE, as forms of commission of a crime, have been established in customary international law since at least 1992. The Appeals Chamber has repeatedly affirmed the relevant analysis in *Tadic*, which examined post-World War II war crimes cases extensively in concluding that joint criminal enterprise as a mode of criminal responsibility is firmly established in customary international law, and has recognised three forms of this mode of liability – JCE I, JCE II, and JCE III. The Appeals Chamber has also held that “the long and consistent stream of judicial decisions, international instruments, and domestic legislation in force at the time” provided “reasonable notice that committing an international crime on the basis of participating in a JCE incurs individual criminal liability”.<sup>377</sup>

The confirmation by the ICTY Appeals Chamber that JCE (including the extended form) is part of customary international law constitutes one of the ICTY's most important contributions to the development of the general part of international criminal law. But is it generally the case that JCE is considered to be now firmly established in international criminal law? The position is a bit more nuanced if one takes into account the jurisprudence of other international criminal tribunals. For instance, the Special Court for Sierra Leone (“SCSL”), in *Sesay et al*<sup>378</sup> on appeal held that the jurisprudence of the ICTY and ICTR correctly reflects customary international law, and joint criminal enterprise can therefore serve as a basis for criminal liability.<sup>379</sup> The Extraordinary Chambers in the Courts of Cambodia (“ECCC”) came to a different conclusion. It held

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<sup>377</sup> *Prlic et al* para 587.

<sup>378</sup> SCSL-04-15-A (26 October 2009).

<sup>379</sup> *Sesay et al* paras 400-402; 475 and 485.

in its Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)<sup>380</sup> that JCE III was not recognised as a mode of criminal responsibility applicable to violations of international humanitarian law.

The Rome Statute of the International Criminal Court (“ICC”) presents yet another view. Article 25(3)(d), on modes of liability, provides for liability based on contribution to a crime by a group acting with a common purpose. The text of section 25(3)(d) holds the following:

In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime [.]

That is reminiscent of JCE, but does it include all forms of JCE, including the extended form? ICC decisions thus far seem to regard article 25(3)(d) as constituting narrow JCE and a residual form of accessorial liability, and not JCE in all its manifestations.<sup>381</sup> Article 25(3)(d) creates two modes of criminal responsibility. The first mode, under article 25(3)(d)(i), punishes the intentional contributions “furthering the criminal activity or criminal purpose of the group”. Said activity or purpose involves the perpetration of a crime under the ICC’s jurisdiction. This wording is typical of what is expected of a codification of JCE I or the common purpose doctrine. Article 25(3)(d)(ii), however, creates a second mode of liability which is not quite JCE in the extended form. The contribution here shall “[b]e made in the knowledge of the intention of the group to commit the crime”. Ohlin submits that the wording is “so syntactically obtuse that it is barely grammatical”.<sup>382</sup> The gist of this provision is seemingly aimed at persons who may provide background contributions, but who are not personally executing the crimes under the jurisdiction of the ICC. This would include assistance through providing firearms, ammunition or vehicles while knowing the unlawful intention of the criminal group but not personally using these means to perpetrate the relevant crimes.

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<sup>380</sup> Case No 002/19-09-2007-ECCC/OCIJ (20 May 2010).

<sup>381</sup> See, for instance, *Dyilo* 2007, at paras 336 and 337.

<sup>382</sup> Ohlin (2007) 5 *Journal of International Criminal Justice* 78.

Rather than pure JCE III as developed and confirmed by the ICTY, the second mode of liability under article 25(3)(d)(ii) of the Rome Statute can therefore best be described as a form of accessorial or accomplice liability.

### **3 3 6 2 3      *Criticism against the doctrine***

The JCE doctrine is not universally accepted and has been subject to criticism, especially due to its potentially wide and far-reaching nature. JCE III, the extended form as developed by the ICTY and confirmed by that tribunal's Appeals Chamber, shares some similarities with the broad application of the common purpose doctrine in earlier South African cases, notably *Nzo*.<sup>383</sup> Indeed, as we have seen, common purpose/JCE, as modes of liability, cast a potentially wide net. The ICTY held that individuals are liable because an unlawful consequence was the "predictable consequence (...) and the accused was either reckless or indifferent to that risk".<sup>384</sup>

Similar concerns raised with respect to *Nzo* in South Africa were also raised with respect to the extended form of JCE. Danner and Martinez note that this extended mode of liability is dangerously uncertain and susceptible to broad judicial interpretation and prosecutorial abuse.<sup>385</sup> The authors refer to *Prosecutor v. Kvočka, Kos, Radić, Zigić & Prcać (Judgment) ("Kvočka")*<sup>386</sup> where the range of the doctrine was illustrated by the Trial Chamber which stated, albeit obiter, that extended JCE could equally be utilised for a group of bank robbers and to "the systematic slaughter of millions during a vast criminal regime comprising thousands of participants".<sup>387</sup> The likelihood of a conviction for a larger criminal campaign and common purpose is greater because prosecutors can use the formulation of charges as a broad, almost all-encompassing tool to target a large cohort of accused persons.<sup>388</sup>

Those who criticise the JCE and common purpose doctrines often encounter pushback in the form of a normative and policy justification, namely the so-called

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<sup>383</sup> See *Nzo* 4 and for a criticism of this approach 3 3 4 2 above.

<sup>384</sup> *Tadić* para 204.

<sup>385</sup> Danner & Martinez (2004) 93 *California Law Review* 135. Also see JD Ohlin "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 *Journal of International Criminal Justice* 69 81-85.

<sup>386</sup> IT-98-30/1-T (2 November 2001).

<sup>387</sup> *Kvočka* para 307. See Danner & Martinez (2004) 93 *California Law Review* 135.

<sup>388</sup> Danner & Martinez (2004) 93 *California Law Review* 136.

“principle of effectiveness”. This principle is a major consideration in the extended form of JCE followed by the ICTY and to a lesser extent the ICTR. This principle dictates that a tribunal is “entitled” to more robust modes of liability, based on the theory that international criminal law is also a concretisation of international human rights law; which is to say, an international trial is not only about the guilt of the individual accused, but also about the rights of victims of mass criminality.<sup>389</sup> This justification for JCE and common purpose as double functional instruments (i.e. modes of liability *and* broad shields for the enhancement of human rights/victims’ rights) corresponds to some extent with the policy consideration in *Thebus*, where the protection of society through the relatively broad criminalisation of collective criminal conduct found favour with the Constitutional Court.<sup>390</sup>

JCE also qualifies the traditional criminal law approaches to individual criminal responsibility or personal guilt.<sup>391</sup> Danner & Martinez point out that the Nuremberg Tribunal, where modern international criminal law was born, noted the importance of the principle of individual (personal) guilt. The Tribunal nevertheless noted that there should not be hesitation in a determination of criminal guilt of a group merely because it is a novel concept – but this must be done carefully in order to avoid the punishment of innocent persons.<sup>392</sup> The judges of the ICTY, as we have seen, took this sentiment much further with the formalisation of JCE in three distinct forms, and with the confirmation that it is indeed part of customary international law. The fact that many of the other international criminal tribunals (including the ICC) declined to follow the ICTY’s expansive view of common purpose mode of liability (especially in the expanded form of JCE) is to a significant degree the result of widespread and consistent critique of the doctrine of JCE.<sup>393</sup> South African and English law on common purpose and JCE, and the increasingly restrictive application of these modes of

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<sup>389</sup> A Orakhelashvili “Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights” (2003) 14(3) *European Journal of International Law* 529 534; Danner & Martinez (2004) 93 *California Law Review* 133.

<sup>390</sup> See *Thebus* para 34.

<sup>391</sup> Danner & Martinez (2004) 120 *California Law Review*; S Manacorda & C Meloni “Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?” 9 (2011) *Journal of International Criminal Justice* 159 166.

<sup>392</sup> See Danner & Martinez (2004) 93 *California Law Review* 85.

<sup>393</sup> For a good summation of the critique, see MG Karnavas “The ICTY legacy: A defence counsel’s perspective” (2011) 3 *Goettingen Journal of International Law* 1053.

liability, regardless of the justification in public policy and victims' rights, are therefore fundamentally in line with developments in international criminal law.

### **3 3 6 2 4      *Concluding remarks on JCE under international criminal law***

There is a clear rationale for a common purpose/joint criminal enterprise mode of liability in international criminal law. The nature of mass criminality and systemic violence necessitates a mode of liability which goes beyond the individual perpetrator's liability. While the rationale for JCE under international criminal law seems clear, the same cannot be said about the precise scope of JCE as developed and applied by the international tribunals (the ICTY, first and foremost). The general trend seems to be away from the extended form of JCE and towards JCE in the two narrower forms ("pure" common purpose or JCE I, and "concentration camp cases" or JCE II). In addition, the Rome Statute of the ICC seems to favour a mode of liability for group-based crimes which can best be described as accessorial liability. So there is some uncertainty as to the precise meaning and scope of JCE under international criminal law. For now, we can draw some general conclusions:

- JCE (at least in the narrower forms of JCE I and II) is probably part of customary international law. This is so because of the jurisprudence of the various international tribunals.
- It is doubtful that the extended form of JCE is part of customary international law, despite pronouncements to this effect by the ICTY. The fact that many other international tribunals have strong reservations about the extended form of JCE supports the tentative conclusion that extended JCE is not part of customary international law.
- The existence of JCE in international criminal law supports the general argument in favour of the retention of common purpose and JCE as modes of liability for group-based crimes under domestic criminal law. This is not to say that principles of international criminal law are directly applicable to domestic criminal law. But it makes the argument in favour of retention more cogent if one looks at the underlying rationale of modes of liability in criminal law, whether at the international or domestic levels.
- Section 232 of the Constitution, 1996, provides that customary international law is law in South Africa, unless it is inconsistent with the Constitution or



with an Act of Parliament. So JCE, at least in the narrower form, is part of South African law, but obviously only with respect to the crimes for which international JCE were developed, namely genocide, crimes against humanity and war crimes. It cannot simply be transposed to organised crime or criminal gang activities, regardless of the destructive and systematic nature of these forms of organised criminality.

- International JCE and domestic common purpose/JCE share a common justification in the sense that these modes of liability were not only developed to hold individuals who act in complex groups or collectivities criminally liable, but also to provide a potentially powerful tool in the hand of the prosecution to advance the protection of systematic human rights and the interests of large groups of innocent civilians and members of the public. This rationale we have seen in the jurisprudence of some of the international criminal tribunals, and it was hinted at in *Thebus* before the South African Constitutional Court.

### 3 3 7      *Possible saving grace: Section 36 of the Constitution*

In the preceding paragraphs we have investigated the comparative and international rationales for the common purpose doctrine. To return now to the domestic setting, it can be noted that the common purpose doctrine has never been subjected to the limitations clause in terms of section 36 of the Constitution. This is due to the fact that the Constitutional Court in *Thebus* did not reach a conclusion of unconstitutionality to even reach this stage.

It is trite in South African constitutional law that the rights in the Bill of Rights are not absolute and subject to limitations. The rights are limited through internal qualifiers<sup>394</sup> or through section 36 of the Constitution. The latter is also known as the

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<sup>394</sup> Section 35(5) of the Constitution, for example, states that

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

general limitations clause. A limitation of rights analysis usually involves an initial two-step enquiry: a court must firstly ascertain whether or not there has been a violation of the specific right(s) in question and secondly whether that violation was justifiable in terms of the limitations clause.<sup>395</sup> A true South African constitutional analysis can therefore only be concluded by moving onto the second step of, in this case hypothetical (or abstract), enquiry.

Section 36(1) states that rights in the Bill of Rights may only be limited by a law of general application and only to the extent “that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Furthermore, a relevant court must take all the relevant factors into account when making such a determination, including the nature of the right,<sup>396</sup> the importance of the purpose of the limitation,<sup>397</sup> the nature and extent of the limitation,<sup>398</sup> the relation between the limitation and its purpose<sup>399</sup> and whether there are less restrictive means available to achieve this purpose.<sup>400</sup>

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This section pertains to the rights of arrested, detained and accused persons under section 35. It clear that evidence obtained in such a fashion must be excluded only upon a judicial analysis when the evidence has been obtained in a manner that violates a right in the Bill of Rights and furthermore *if* the admission of such evidence renders the trial unfair *or* is otherwise detrimental to the admiration of justice. Evidence obtained in a fashion that violates a right in Chapter 2 of the Constriction will not *ipso facto* be excluded and thus in certain circumstances will limit the rights of arrested, detained and accused persons. For a comprehensive discussion on section 35(5), see Van der Merwe & Schwikkard *Principles* Chapter 12.

<sup>395</sup> I Currie & J de Waal *The Bill of Rights Handbook* (2013) 6 ed 165-166.

<sup>396</sup> Section 36(1)(a).

<sup>397</sup> Section 36(1)(b).

<sup>398</sup> Section 36(1)(c).

<sup>399</sup> Section 36(1)(d).

<sup>400</sup> Section 36(1)(e).

The common purpose doctrine is undoubtedly a law of general application as the law in question does not have to be *statutory* law but also includes the common law and customary law.<sup>401</sup>

The purpose of the limitation on the presumption of innocence is rooted in public policy. That is, specifically to deal with the “significant society scourge” (as described in *Thebus*)<sup>402</sup> that is group criminality and to relieve the prosecution in having to prove the causation element in these cases – where the latter is often difficult to establish. This is certainly an important governmental purpose to pursue and the State cannot truly be faulted for *wanting* to curb group criminality.<sup>403</sup>

A further consideration here is the nature and the extent of the violation, that is, the violation of the presumption of innocence through the State not having to prove all of the elements of a crime beyond a reasonable doubt. At least not all of the elements are negated but only the requirement of causation. The violation is nevertheless serious in nature as this is an extreme departure from the traditional principles of criminal law. The last factor, whether there are less restrictive means to achieve this goal, is possibly the most important consideration.

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<sup>401</sup> The Constitutional Court has considered whether the “law of general application” requirement is satisfied by the common law. In *President of The Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) the court relied on jurisprudence from the Canadian Supreme court as well as the European Court of Human Rights (“ECHR”) in *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245 para 49 (“*Sunday Times*”). In *Sunday Times*, the ECHR considered whether the common law would fall within the scope of “prescribed by law” within article 10(2) of the European Convention on Human Rights (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221. The ECHR consequently held that two requirements had to be satisfied, firstly that the relevant rules must be “adequately accessible” to the public. Secondly, it must be “formulated with sufficient precision to enable the citizen to regulate his conduct”. This test is quite reminiscent of the tests for satisfying *ius certum* under the principle of legality. See Chapter 5 below for a detailed discussion on the principle of legality including *ius certum* (5 3 2 2 1).

<sup>402</sup> *Thebus* para 34.

<sup>403</sup> See example *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) para 16 where the Constitutional Court, also in the context of an infringement of the presumption of innocence, held that

The contention was that the provision is intended to ensure effective policing and to facilitate the investigation and prosecution of crime as well as to ease the prosecution's task of securing convictions for contraventions under the Act. Such an objective is truly laudable and its importance, in the current climate of very high levels of violent crime, cannot be overstated.

Lesser forms of liability such as conspiracy, incitement or even attempt to commit a crime are worthy and less restrictive means to deal with a charge of murder or assault (which are the cases which most often employ the common purpose doctrine). These measures may not serve the retributionist societal interest or need to hold someone responsible for the substantive crime of murder or assault to the same extent, but the principle of fair labelling must prevent the overemphasis this societal need. The same objective can therefore still be achieved through these measures. The most dramatic example is certainly *S v Makwanyane* ("*Makwanyane*")<sup>404</sup> where lifelong imprisonment was held to be an appropriate and less restrictive manner in achieving the same governmental goals as the death penalty.<sup>405</sup> In response to the debate of whether life imprisonment was an acceptable means to achieve the same goals<sup>406</sup> as the death penalty, Chaskalson P held that

(...) [T]he question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law.<sup>407</sup>

This is equally as true for the common purpose doctrine. Criminals will not escape punishment. They will be punished in line with what the State would *prove beyond a reasonable doubt* and not allow the State to rely on the crutch of guilt by imputation. This in turn also gives effect to the fair labelling doctrine. Employing other secondary means of liability will not translate into a limitation of the presumption of innocence. *All* elements will have to be proven for conspiracy and incitement or to be found guilty as

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<sup>404</sup> 1995 (3) SA 391 (CC).

<sup>405</sup> See for example *Makwanyane* at para 212 where Kriegler J held that

[n]o empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment.

<sup>406</sup> These goals were enumerated as deterrence; prevention and retribution. See *Makwanyane* paras 116-131 for Chaskalson J's analysis of these goals. Also see Currie & De Waal *Handbook* 166.

<sup>407</sup> *Makwanyane* para 117.

an accomplice. These available and less restrictive measures are (or must be) preferred<sup>408</sup> to the common purpose doctrine that negates the causation requirement.

Thus, purely from a constitutional perspective, it is submitted here that the common purpose doctrine would likely not survive constitutional scrutiny under section 36. To be clear: there are seemingly good rationales for the existence of common purpose/JCE under both international and domestic criminal law, as we have seen previously. But those rationales may not be enough to save the common purpose doctrine under South African criminal law, if viewed through a constitutional lens.

### 3 3 8      *Evaluation*

The following broad evaluations and recommendations flow from the discussion above.

The common purpose doctrine, in its current form, applies not only to groups or complex collective criminal matters, but also to individuals acting in small and opportunistic groups. The doctrine negates the causation requirement and consequently *prima facie* offends the presumption of innocence and has oppressive and unfair consequences. It is therefore unjustifiable within our current constitutional regime.

Judicial intervention and development would promote constitutional and doctrinal compliance and is in line with the constitutional order in terms of section 39(2) of the Constitution.

The true utilitarian application of the doctrine is when it is applied to “mob-like” scenarios such as in *Thebus* or *Safatsa* where it is *impossible* to determine which of the accused persons causally contributed to the unlawful consequence. These scenarios are mostly associated with active association cases, where the negation of the causal element is more apposite. Active association and prior agreement cases, where it can be determined which of the accused parties causally contributed to the unlawful consequence, should rather be dealt with in terms of other inchoate offences or in terms of accomplice liability. This approach is especially preferred in prior agreement cases where more evidence would likely available regarding each

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<sup>408</sup> Currie and De Waal correctly point out that if the same goals can be achieved where the rights in question are not restricted at all (or less invasively) such means should be preferred – see Currie & De Waal *Handbook* 170.

participant's contribution to the criminal scheme. The use of the common purpose doctrine in these scenarios is superfluous and the limitation of the constitutional rights of accused parties here is consequently unnecessary.

The principle of fair labelling is an important consideration here. If one considers that a person, under the same factual scenario, can be held liable as a co-offender (under the common purpose) *or* as an accomplice (or some other lesser form of liability), it becomes patent that courts should favour imposing a lesser form of liability when it is clear who factually and legally contributed to the unlawful consequence; or to what extent. The UK approach under the joint enterprise doctrine is to hold accused parties falling in this category liable as accomplices and furthermore also distinguish between several degrees of murder or killing.<sup>409</sup> South African courts often do not appropriately consider each participant's contribution (when it is ascertainable) to the crime at the sentencing stage,<sup>410</sup> or differentiate between degrees of murder, which would alleviate some of the draconian consequences of the doctrine. Fair labelling would thus be promoted by following the UK approach or at least by appropriately appraising the contribution of each participant at sentencing. Arguments underlying judgments such as *Thebus*, where it is suggested that criminals will escape liability if not for the common purpose doctrine, are thus flagrantly inaccurate and hold no water.

It would furthermore, considering the recent developments of the joint enterprise doctrine, be advantageous to apply the element of *dolus* more strictly and be cognizant of overzealous inferential reasoning with regards to *dolus eventualis*. This is a considerably broad category of intent and considering that causation is completely ignored, it may be fairer to an accused to be held liable for consequences where he or she in fact intended (more specifically, *dolus directus*).

*Dolus eventualis* is however a well-accepted and established form of intent in South Africa. The SCA confirmed *dolus eventualis* as an acceptable form of intention in common purpose cases. In *S v Nkosi* ("Nkosi"),<sup>411</sup> one of the robbers was fatally shot during the execution of their common purpose. The SCA found that the appellant had the requisite *mens rea* in the form of *dolus eventualis*. He was well aware and foresaw

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<sup>409</sup> See Kemp et al *Criminal Law* 267 (and fn 51).

<sup>410</sup> See Burchell *Principles* 477; Kemp et al *Criminal Law* 267.

<sup>411</sup> 2016 (1) SACR 301.

the risks associated with their criminal endeavour (although the death was not his direct intent) and therefore the need for loaded firearms.<sup>412</sup> It was naturally foreseen that the firearms would be used and the use thereof would lead to fatalities.

Hector highlights the importance and usefulness of *dolus eventualis* in criminal trials as the most important form of intention and even posits that it is the “cornerstone of criminal liability”.<sup>413</sup> The possibility that the SCA or the Constitutional Court would intervene like the courts in *Jogee* seems highly unlikely. This does not mean that it is infallible or immune to scrutiny. Considering that this form of intention requires a court to make certain inferences and postulations from surrounding circumstances, a finding on the presence of *dolus eventualis* is a significant exercise into the subjective state of mind of an accused. This additionally requires postulations and inferences with regards to an accused’s own evaluations on the state of mind of his co-accused. Questions regarding the limitation (or even the inclusion) of the recklessness (or volitional) requirement for *dolus eventualis* are thus appropriate.<sup>414</sup>

Inferential reasoning in cases involving common purposes and *dolus eventualis* could also lead to far-reaching consequences.<sup>415</sup> When there is a change in the criminal objectives originally associated with, a co-perpetrator (other than the one physically committing the unlawful act) may only be held liable if he or she associates with the new criminal objective.<sup>416</sup> This is especially true in scenarios like *Nzo* where it was emphasised that the accused belonged to an ANC terrorist group and the Court inferred that any and all consequences flowing from this group can be attributed to the accused because they were foreseen. It can be argued that significant weight was attached to the fact that he was a member of a banned and clandestine terrorist group and *because of that* should be liable.<sup>417</sup>

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<sup>412</sup> *Nkosi* para 6.-7.

<sup>413</sup> S Hector “The Concept of *Dolus Eventualis* in South African Law – An Historical Perspective” (2008) 14(2) *Fundamina* 14 14.

<sup>414</sup> See Hector (2008) 14(2) *Fundamina* 9.

<sup>415</sup> Kemp et al *Criminal Law* 267. In *Lungile* (para 16) the SCA was mindful (and also refers to previous cases where this caution was expressed) of this type of inferential or deductive reasoning in dealing with *dolus eventualis*. The Court referred to the subjective nature of the enquiry as well as the accompanying thought processes involved in any particular factual scenario.

<sup>416</sup> Kemp et al *Criminal Law* 264. This is somewhat reminiscent of the fundamental difference rule under JCE in English law (see 3 3 6 1 2 above).

<sup>417</sup> Also see Burchell (1990) *South African Journal of Criminal Justice* 349.



### 3 3 9 *Recommendation: Statutory regulation of the common purpose doctrine*

Finally, it is worth mentioning that the common purpose doctrine as currently understood in South African common law is not an adequate form of addressing organised crime in terms of the Palermo Convention. Article 5 of the Convention, for example, requires that a member state “adopt such *legislative and other measures* as may be necessary to establish as criminal offences (...)”.<sup>418</sup> The common purpose would be disqualified here because it is not a legislative (or administrative) measure. The doctrine would furthermore probably not comply with the requirement prerequisite of an “organized criminal group,”<sup>419</sup> which requires the group to exist for a period of time. Even in cases of common purpose by agreement, the groups are not necessarily “organized” or participate in “organized crime” in the generic sense. It would thus not be sufficient to regulate criminal gang activities exclusively through the common law. The answer to this may be that there be some form of legislative intervention to codify to common purpose doctrine: not only for it to be utilised in the fight against criminal gang activities (and complying with the Palermo Convention) but for it to be substantially fairer in every application – even when not utilised for criminal gang activities.

The regulation of group-based crimes should occur within statutory regulation rather than the broad and unpredictable common purpose doctrine. It is suggested here that a statutory intervention takes place in this regard. The controversial genesis of JCE under international criminal law also provides support for the argument that this mode of liability should rather be codified. The temptation of an ever-expanding notion of JCE caused a backlash among commentators and even some international judges, as we have seen. Rather than having to deal with an amorphous doctrine, susceptible to

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<sup>418</sup> Own emphasis.

<sup>419</sup> Article 2(a) states that an “organized criminal group”

shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit [.]

Also see the discussion of this definition below at 4 3 2 as well as Article 5(1)(a)(i) of the Palermo Convention.

abuse (regardless of the laudable reasons for its existence) it is better to codify it in clear terms, and preferably as part of a coherent legislative framework dealing with group-based and complex crime (such as the atrocity crimes under the ICC's jurisdiction, organised crime, and criminal gang activities). We will return to this point later. But first it is necessary to look at conspiracy, incitement, and public violence as complementary or, if necessary, alternative bases for prosecuting group-based criminality, including gang related activities.

### 3 4 Conspiracy

#### 3 4 1 Introduction and definition

Burchell describes a conspiracy (in the generic sense) "(...) as an agreement between the two or more persons to commit, or to aid or procure the commission of, a crime".<sup>420</sup> The author notes that there has not been a popular application (like in the USA) of the crime with other possible options such as the common purpose doctrine available to the State.<sup>421</sup> A person commits the crime of conspiracy in terms of section 18(2)(b) Riotous Assemblies Act 17 of 1956 ("RAA"), which reads as follows:

(2) Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit (...)
- any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Conspiracy, just as does the crime of incitement, constitutes an independent offence and conviction does not require further acts towards the commission of the proposed offence.<sup>422</sup> What is required, however, is a subjective agreement between the co-conspirators, which constitutes the *actus reus*.<sup>423</sup>

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<sup>420</sup> Burchell *South African Criminal Law & Procedure vol I* 551.

<sup>421</sup> Burchell *South African Criminal Law & Procedure vol I* 550.

<sup>422</sup> Burchell *South African Criminal Law & Procedure vol I* 551. The author notes that the common law position differed in that it required some act towards the commission of the crime before an accused can be found guilty of the crime.

<sup>423</sup> *R v Harris* (1927) 48 NLR 330; Burchell *South African Criminal Law & Procedure vol I* 551.

The rationale behind criminalising anticipatory conduct is, once again, to address the dangers associated with group criminality. It furthermore seeks to punish those who have “manifested their disposition to criminality.”<sup>424</sup> A second justification is manifested in the theory that group criminality (even at the conspiratorial phase) poses a “special danger”.<sup>425</sup> Cowling submits that conspiracy in terms of the RAA, just as the common purpose doctrine, showed a tendency to be applied to “political offences” which has been a hindrance in its subsequent judicial development.<sup>426</sup>

### 3 4 2 *Interaction with section 9 of POCA*

In *S and Alexander and Others (“Alexander”)*<sup>427</sup> the Court stated the following:

Where two or more persons have associated themselves in an organisation with the agreed purpose or object of committing an offence, they have in law formed a conspiracy to commit the contemplated offence. It follows that any person who joins such an organisation as a member, well knowing the object or purpose thereof or who remains a member after becoming aware of the purpose thereof, has signified by his conduct his agreement with the aims of the said organisation and has made himself guilty of a conspiracy to commit such offence.<sup>428</sup>

The crime of conspiracy is comparable to section 9(1)(a) of POCA, which holds that gang members or active participants in a gang, shall be guilty of an offence if he or she “wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang”.

Snyman doubts the independent application or usefulness of section 9(1)(a) of POCA which regulates similar criminal behaviour.<sup>429</sup> The author correctly submits that the aforementioned section of POCA does not require the commission of a crime but only that he or she “wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang” together with gang membership or active participation in that gang. There is no significant difference

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<sup>424</sup> Burchell *South African Criminal Law & Procedure vol I* 550 referring to W LaFave *Criminal Law* 5 ed (2000) 567-568.

<sup>425</sup> See W LaFave & AW Scott Jr *Handbook on Criminal Law* (1972) 459.

<sup>426</sup> Cowling (1998) *South African Journal of Criminal Justice* 369.

<sup>427</sup> 1965 (2) 1 All SA 81 (C).

<sup>428</sup> *Alexander* at 85.

<sup>429</sup> Snyman (1999) *South African Journal of Criminal Justice* 218-219.

between this offence and the formulation in *Alexander*. Snyman furthermore argues that the same conclusion can be reached when comparing subsections (b) and (c) to the crime of conspiracy.

The only difference worth mentioning is probably sentencing – where crimes committed in terms of POCA would carry a lesser sentence than section 18(2)(b) of the RAA.<sup>430</sup> A person who contravenes subsections 9(1)(a) or (b), shall be liable for a fine or imprisonment not exceeding six years.<sup>431</sup> It will however be an aggravating circumstances for the purposes of sentencing if a crime in terms of subsections 9(1)(a) or (b) was committed on the premises or grounds of or within 500 meters of a (public or private) school or educational institution during school hours, school-related programmes or in circumstances where minors are using the school facilities.<sup>432</sup> When a person is liable for conspiracy in terms of the RAA, he or she will be liable as if he or she has committed that offence, regardless of whether that offence was executed.<sup>433</sup> Even though the provisions in POCA create quasi-conspiracy offences, they are still weaker. This could also probably be due to the fact that the accused would have been or will be punished for the underlying predicate crime and would lead to excessive punishment if the same approach as the RAA was followed.

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<sup>430</sup> See Snyman *Criminal Law* 289 where the author contends that this should not be the case and there should be a lighter sentence in cases where the conspiracy did not lead to the commission of the proposed offence. This is due to the fact that the conspiracy does not bring about the same consequences as the commission of the actual offence.

<sup>431</sup> In terms of 10(1)(a) of POCA.

<sup>432</sup> In terms of 10(2) of POCA.

<sup>433</sup> In terms of section 18(2) of RAA. Blindly applying the sentence of the substantive offence however does not seem to be the correct approach. This has been criticised by the Western Cape High Court in *S v Smith* 2017 (1) SACR 520 (WCC). Rogers J (at para 101) held that the court *a quo* was incorrect in applying the mandatory minimum sentence for murder (in the case regarding conspiracy to do so) under the General Law Amendment Act 105 of 1997. The Court the minimum sentence was certainly not the starting point and further that

[t]he fact that the permissible sentencing range for conspiracy to commit a crime is determined by the permissible sentencing range for the crime itself does not mean that the starting point, in a case of conspiracy, is the sentence which would have been imposed if the crime had been successfully committed.

Also see A van der Merwe “Recent Cases” (2017) 2 *South African Journal of Criminal Justice* 283 290.

Conspiracy is also a better alternative than the common purpose doctrine in cases of group criminality. The latter is, as mentioned above at 3 3 4, constitutionally and doctrinally problematic.<sup>434</sup> If the common purpose doctrine were to become unworkable through fresh constitutional perspectives, then conspiracy would be a competent “back-up” in order to punish criminal agreements.<sup>435</sup> In instances of criminal gang activities, conspiracy in terms of the RAA is also more flexible than the crimes enumerated in Chapter 4 of POCA. Section 18(2)(b) of the RAA is not circumscribed by the preliminary requirements set out in POCA. The State is, for example, not limited to situations involving a “criminal gang” as per section 1 of POCA.<sup>436</sup>

Conspiracy is also one of the listed crimes in terms of Schedule 1 to POCA that may be used to form the requisite pattern of criminal gang activities. A gang member may thus, in addition to being convicted of conspiracy to commit a crime, be held liable in terms of POCA.

### 3 5 Incitement

#### 3 5 1 *Introduction and definition*

The crime of incitement has both a common law and statutory form. The rationale for the crime, as pointed out in *R v Zeelie* (“*Zeelie*”),<sup>437</sup> is firstly to discourage those who try and convince others to commit unlawful acts and secondly to protect the recipients of the incitement from being influenced by the criminal motives of others and consequently committing the incited act.<sup>438</sup> Just as with the common purpose doctrine and conspiracy, it also addresses the societal distaste for group-based criminal activity.<sup>439</sup>

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<sup>434</sup> Also see Kemp et al *Criminal Law* 267-269; Burchell *South African Criminal Law & Procedure vol I* 550.

<sup>435</sup> Burchell *South African Criminal Law & Procedure vol I* 550.

<sup>436</sup> Also see 4 5 1 below.

<sup>437</sup> 1952 (1) 400.

<sup>438</sup> *Zeelie* at 405.

<sup>439</sup> Burchell *South African Criminal Law & Procedure vol I* 541.

Incitement in terms of the common law is defined very widely. In *S v Nkosiya and another* (“*Nkosiya*”)<sup>440</sup> it was held that “(...) an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime”.<sup>441</sup>

Incitement also has a statutory form in terms of the RAA. Section 18(2)(b) of the RAA holds that a person who

incites, instigates, commands, or procures any other person to commit, any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Incitement is an independent offence that is separate from the crime that the accused is inciting the incitee to commit and no further steps have to be taken to actualise the crime.<sup>442</sup> According to section 18(2)(b), the inciter shall be liable to face the same punishment as the incitee (the physical perpetrator), if the incitee were to be convicted. This punishment applies whether or not the incitee was successful or not. The equal punishment of the inciter does not seem to occur in practice as the inciter seems to receive more favourable or lenient punishment than the incitee.<sup>443</sup>

### 3 5 2      *Interaction with section 9 of POCA*

In order to form a pattern of criminal gang activities in terms of section 1 of POCA (read with Chapter 4), the accused must commit two or more of the offences listed in Schedule 1 of POCA. Item number 34 states that “any conspiracy, incitement or attempt to commit any offence” listed or referred to in Schedule 1 will also qualify as a predicate act. A person may be found guilty of a gang-related crime in terms of POCA, in addition to a conspiracy or incitement conviction.

Section 9(2)(b) and (c) both create incitement-type crimes. 9(2)(b) makes it a crime to incite, instigate, command, aid, advise, encourage or procure someone to participate in or perform in a pattern of criminal gang activities. This offence is substantially similar

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<sup>440</sup> 1966 (4) SA 655 (A).

<sup>441</sup> *Nkosiya* 658.

<sup>442</sup> See *R v Nhlovo* 1921 AD 485; *South African Criminal Law & Procedure vol I* 541.

<sup>443</sup> Burchell *Principles* 539. See for example *S v Boshoff* 2013 JDR 2181 (ECG) where a person was sentenced to three years imprisonment for an incitement to commit fraud, obstruction of justice and committing corruption.

to offence in terms of the RAA. It is doubted whether this offence is of any particular use or when it would be preferred above section 18(2)(a) of the RAA. The State could more easily rely on the RAA because it is not restricted by the preliminary requirements in terms of section 1 of POCA<sup>444</sup> such as the restriction to the items listed in the Schedule to POCA due to the fact that a pattern of criminal gang activity can only be brought about the items listed in the Schedule. “Traditional” incitement may be effected through any common law or statutory offence or regulation.

Section 9(2)(c) criminalises gang recruitment, including incitement to join a gang. This is an odd provision because gang membership is not illegal. Liability only arises when gang membership is coupled with a pattern of criminal gang activities and the offences listed in Chapter 4. Although the motivation and intention behind this provision is most likely to curb gang recruitment and to protect individuals from violent or dangerous gang recruitment strategies, it must be questioned whether it is logical or even possible to punish the incitement to commit something that is not illegal. If the motivation behind incitement is the prevention of the instigation or promotion of crimes, as pointed out in *Zeelie*, then this is truly an odd crime. Even if this “incitement” to join a gang is successful, the incitee still has to *participate* in the gang’s activities before the conduct enters the sphere of unlawfulness. Criminalising the incitement of *active participation* (or even the participation in a pattern of criminal gang activities like in section 9(2)(b) of POCA) is a much more logical endeavour.

Section 10(3) may also be used in conjunction with a charge of incitement.<sup>445</sup> This aggravating factor may be attached to any other offence than those enumerated in Chapter 4 and shall be considered as an aggravating factor for purposes of sentencing, provided that the accused is a member of criminal gang. It is submitted that, due to the simplicity of this scheme, that this may be a popular application of POCA in the future.<sup>446</sup> It is however still subject to the prerequisite conditions in terms of section 1 of POCA.

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<sup>444</sup> It is however still an open question whether these preliminary requirements are peremptory or merely discretionary. See Chapters 4 5 1 and 5 3 2 below for a comprehensive discussion of the issue.

<sup>445</sup> See for example *Thomas* where the sixth charge against Accused number 1 was the alleged contravention of section 18(2)(b) of the RAA, read together with section 10(3) of POCA.

<sup>446</sup> See 4 5 3 3 below. The State’s reliance on section 10(3) was extremely successful compared to the substantive charges in terms of section 9 of POCA.



The State may almost always opt to charge a gang member with incitement under the common law than the incitement-type crimes under Chapter 4 of POCA because of the lower evidentiary burden in relation to incitement as well as a potential sentence equivalent to that of the incited crime.<sup>447</sup> This may be, as mentioned above, due to the fact that an accused may have already been sentenced for the underlying predicate offence(s) and thus a heavy punishment for incitement-type crimes under POCA may be excessive.

### 3 6 Public violence

#### 3 6 1 *Introduction and definition*

There has been a dramatic increase of reported instances in public violence in South Africa and its commission has doubled from 2004 to 2015.<sup>448</sup> This could be ascribed to the increase in protests in 2015 and several instances of gang activities especially in the Western Cape.<sup>449</sup>

In *S v Whitehead and Others* (“*Whitehead*”)<sup>450</sup> the Supreme Court of Appeal relied on Burchell’s definition for public violence, which holds that the crime of public violence is

the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others.<sup>451</sup>

The rationale for the crime is to protect public peace and tranquillity or security.<sup>452</sup> Public violence often overlaps with other crimes that may occur in the course of the action where it infringes personal rights such as bodily integrity or property rights. A group of persons may thus assault a person or damage property which may holistically

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<sup>447</sup> Also see discussion at 4 5 2 5 below.

<sup>448</sup> See ISS “South Africa National Statistics” (29-09-2015) /ISS <<https://issafrica.org/crimehub/national-statistics>> (accessed 24-05-2016). There were 979 reported instances of public violence in 2004 to 1993 reported instances in 2015.

<sup>449</sup> See for example South African Government News Agency “Heavy sentences for public violence convicts” (07-2014) *SAnews.gov* <<http://www.sanews.gov.za/south-africa/heavy-sentences-public-violence-convicts>> (accessed 24-05-2016).

<sup>450</sup> (1) SACR 431 (SCA).

<sup>451</sup> *Whitehead* para 38.

<sup>452</sup> See *R v Salie & Others* (1938) TPD 136 (“*Salie*”). Also see Snyman *Criminal Law* 312.

be viewed as an instance of public violence.<sup>453</sup> The crime of public violence is however only committed when these actions reach “sufficiently serious dimensions”. These actions may however transcend “mere” public violence and overlap with the crimes of sedition and even high treason.<sup>454</sup>

The definition of the crime is extremely wide and uncertain which may make it subject to prosecutorial misuse.<sup>455</sup> The unlawfulness of public violence lies within the violence and infringement of rights associated with it and has to be distinguished from non-violent protesting.<sup>456</sup> Public violence can only be committed by multiple persons (in other words, more than two).<sup>457</sup> Other than this requirement, there is no fixed number of persons that are required to participate in the violence but they are required to act in concert and it must transcend mere private altercations.<sup>458</sup> In *R v Ngubane and Others* (“*Ngubane*”)<sup>459</sup> Shaw AJ took a holistic view of the facts and came to the conclusion that the matter at hand was rather that of assault than public violence and thus agreeing with the appellants.<sup>460</sup> The Court considered the confined nature; limited duration and number of people involved in the altercation and stated that on the facts these factors were all indicative of assault than public violence.<sup>461</sup> Acts of gang violence perpetrated in large groups would most likely fall under the sphere of public violence due to the number of persons acting in concert when committing violent acts.

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<sup>453</sup> Snyman *Criminal Law* 312.

<sup>454</sup> Snyman *Criminal Law* 312. The author points out the right afforded in terms of section 17 of the Constitution with regards to assembly, demonstration, picket and petition. The internal qualifier to this right is that these actions be peaceful, and unarmed.

<sup>455</sup> See for example *Salie* where Solomon and Schreiner JJ both refer to the broad nature of the crime. Solomon J at 138 refers to the dissension in the authorities with regards to constructing a uniform definition of the crime. The learned judge goes at 139 further and in referring to the factors in differentiating instances of public violence from assault or private violence should be reduced in scope or “perverted from its original idea” in order to bring “quarrelsome natives” to justice. Schreiner J concurs at 140 with this sentiment and holds that it should not lightly be held that a given instance is that of public violence where there is doubt as to the matter, due to the “wide elastic” nature of the crime. Such wide and uncertain definitions of crimes potentially offend the principle of legality, especially *ius certum*. See 5 3 2 below for a discussion on the principle of legality.

<sup>456</sup> Burchell *Principles* 779.

<sup>457</sup> *R v Cele and others* 1958 (1) SA 144 (N) (“*Cele*”); *R v Noxumalo and others* 1960 (2) SA 442 (T).

<sup>458</sup> Burchell *Principles* 779-780.

<sup>459</sup> 1947 (3) SA 217 (N).

<sup>460</sup> *Ngubane* 218-219. Shaw AJ relies on *R v Mcunu and Others* (1938) NPD 229 to support this view.

<sup>461</sup> *Ngubane* 218-219.

The phrase “acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace” is a broad and enigmatic legal construction. This may require an act or threat of actual violence (the disturbance element) and that this must be differentiated from the use of force traditionally displayed during public protesting.<sup>462</sup> It is interesting to note that under this construction the *threat* of violence would qualify as the requisite act but not the use of force (which does not amount to violence).<sup>463</sup> The idea that actual violence does not have to occur stems from Van der Linden’s writings. The central point of contention in *R v Segopotsi and Others* (“*Segopotsi*”)<sup>464</sup> was whether an act of public violence had to have materialised in order for the accused parties to be held liable for the aforementioned crime. Claassen J held that the “acts of preparation” satisfied the requirements for public violence and that it was not the position in terms of South African law for these acts to have resulted in actual violence.<sup>465</sup> Claassen J especially relies on Van der Linden in this regard.<sup>466</sup> This disturbance must furthermore be of a “sufficiently serious dimension”. Schreiner J, in his separate, concurring opinion in *R v Salie & Others* (“*Salie*”)<sup>467</sup> considered the determination of the “detentions of the fight” as “all-important” and suggested a holistic approach to the evaluation of this element, considering the particular factual scenario including the scale and reasons for the altercation.<sup>468</sup> Solomon J suggested (and Schreiner J did so expressly)<sup>469</sup> that the particular factual scenario is a borderline case

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<sup>462</sup> Burchell *Principles* 780-781. See importantly *Cele* at 153 where the Court rejected the contention by the appellants that a threat of public violence does not constitute the crime of public violence and that the situation is indistinguishable from a threat of common assault in the sense that the threat of violence and personal harm also constitutes an assault.

<sup>463</sup> Burchell *Principles* 780-781

<sup>464</sup> 1960 (2) SA 430 (T).

<sup>465</sup> *Segopotsi* at 433. The Court also refers to *R v O’Brien* (1914) TPD 287 at 289, where De Villiers JP also, upon analysis and with reference to Van der Lingen, does not find that it must “be specifically alleged or proved that persons *have as a fact been terrorised*” (own emphasis).

<sup>466</sup> See for example *Segopotsi* at 433 where Claassen J refers to a translation of Van der Linden’s text which stated that “all such acts as have for *their object* the unlawful disturbance of the peace and security or a forcible invasion of the rights of other people” (own emphasis) and “Behalven door het maken van oproer, wordt de misdaad van geweld gepleegd door alle die daaden welke eene wederregtelijke stoorring der rust en veiligheid, of een gewelddadig indringen in de regten van andere menschen, *ten doelwit hebben*” at 436.

<sup>467</sup> (1938) TPD 136.

<sup>468</sup> *Salie* at 140.

<sup>469</sup> *Salie* at 140.

but noted that there was not a “public character” to the altercation and that the locality of the violence was private property of one of the involved families. There was also no attempt to assemble a group of persons to embark on a campaign of organised public violence and dimensionally the situation was on a small scale and “unworthy” to be characterised as public violence.<sup>470</sup>

Schreiner J also points to the usefulness of the crime of public violence. The learned judge suggested that it would be preferred to charge an amorphous group of people with public violence if they did in fact take part in the criminal activities of the group and when it is of a considerable nature and individual prosecution might be impractical.<sup>471</sup> This is preferred over dealing with the (alleged) individual role players because it is “very difficult to ascertain the relative parts played by the different persons and to fix the degrees of guilt”.<sup>472</sup> This is to avoid the conflicting and unavoidably hearsay evidence all in the vein of “(...) X was there; Y had an axe; Z came later on (...)”.<sup>473</sup> This justification is stronger here than in the case of common purpose. It seems that the common purpose doctrine would impute a *harsher* unlawful consequence where here it is imperative that the accused in fact participated in the public violence before a conviction would be secured.<sup>474</sup> This would protect innocent parties to a degree who participated in a demonstration that took on a violent nature and where the identities of the actual perpetrators are unknown. The common purpose doctrine would probably be used (or used in conjunction with a charge of public

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<sup>470</sup> *Salie* at 139.

<sup>471</sup> *Salie* at 140.

<sup>472</sup> *Salie* at 140.

<sup>473</sup> *Salie* at 140.

<sup>474</sup> See *Cele* at 153 (and also referring to the Court’s reasoning in *Salie*) that due to the “elastic nature” of the crime, that a conviction should not arise unless it can be proved that a particular accused was party to the acts of public violence. A conviction should not arise if acts of violence were perpetrated by *certain* members of the crowd of which the accused happened to be a part of. Also see Burchell *Principles* 781.

violence) because it is more advantageous from a prosecutorial standpoint due to the lower level of participation required to secure a conviction.<sup>475</sup>

The abovementioned requirements must necessarily be linked to the requisite intention, specifically to “forcibly disturb the public peace or security or to invade the rights of others”.<sup>476</sup> The accused must have the intention to engage in the activities of the group participating in public violence or at minimum foresee that that public violence will be the result of the organised gathering.<sup>477</sup> The SCA in *Le Roux* stressed the importance of determining the individual liability of each appellant and rejected the court *a quo*’s contention that mere presence at the scene of the violence was sufficient to establish liability based on the conduct of other members.<sup>478</sup>

### 3 6 2            *Interaction with section 9 of POCA*

Item number 2 of the Schedule 1 specifically references public violence as one of the crimes that can form the requisite pattern of criminal gang activities. The State would secure a conviction under Chapter 4 of POCA if a criminal gang were to repeatedly commit acts of public violence over a period of time. This is due to the fact that the crime of public violence is so broadly defined that it also overlaps with the offences in section 9 of POCA, especially subsections 9(1)(b) (where it is offence to “[*threaten*]<sup>479</sup> to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang”) and 9(1)(c) (where it is an offence to “[*threaten*]<sup>480</sup> any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence”).

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<sup>475</sup> Also see *Salie* at 139-140 where Solomon J points to the burden on the court being relieved of the task to determine the criminal liability of each of the participants severally when under the crime of public violence. It is thus sufficient that an accused did *something* with the group and associated with them somehow. The judge then went on to state that courts should not be “over ready to dispense with the need for ascertaining the individual misdeed of accused persons accurately” unless it is a genuine case of public violence.

<sup>476</sup> *Whitehead* para 38.

<sup>477</sup> Burchell *Principles* 782.

<sup>478</sup> See *Le Roux* para 19 where the SCA especially relies on the approach by the Appellate Division in *Mgedezi*.

<sup>479</sup> Own emphasis.

<sup>480</sup> Own emphasis.

These offences complement each other very well. The repeated commission of acts of public violence would secure a gang conviction. It does however raise the question what the novelty of (especially) sections 9(1)(b) and (c) is. This is once again just an instance of the common law rephrased into a statutory crime. The argument is not here that the section is not useful but rather that the Legislature should rather have focused on criminalising conduct in a novel way – not for the sake of novelty – but for it to be of actual use for the prosecution or regulate conduct which previously fell outside the ambit of criminal sanction. By including the threats of the forbidden acts in subsections 9(1)(b) and (c), these crimes then fall squarely within the ambit of public violence as interpreted and developed in South African case law. Codifying public violence through the aforementioned provisions in section 9 of POCA (albeit unintentionally) addresses concerns regarding the possible violation of the principle of legality, especially *ius certum* and *ius strictum*.

### 3 7 Final remarks

A review of the South African common law and statutory law traditionally used to address group-based crimes has shown that there is no *substantial* difference between those modes of liability, common law and statutory crimes and the offences created in Chapter 4 of POCA. The latter crimes, after a brief comparison with existing common law and statutory crimes, appear to be *largely* superfluous and will find exclusive application in *very* limited factual scenarios. The next chapters of this dissertation will show that Chapter 4 of POCA would have benefited greatly from a broader investigation of foreign and international modes of criminalisation of gang activities.

The most useful of the POCA Chapter 4 mechanisms appears to be section 10(3). Although it is simple to “attach” this provision to any gang-related offence other than those listed in Chapter 4, it is still subject to the prerequisite definitional requirements in Chapter 1. The reason for this popular application may be due to the fact that the crimes in Chapter 4 are so similar to more familiar common law offences, that the common law offences are preferred when applicable and carry heavier sentences. In cases such as murder which does not substantially overlap with the abovementioned common law crimes, Chapter 4 of POCA seems to be preferred.<sup>481</sup>

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<sup>481</sup> See *Thomas* and the discussion below in Chapter 4.

Despite the constitutional and doctrinal issues with the common purpose doctrine, it remains the law of the land. South Africa is also not an outlier in this regard. As we have seen, joint criminal enterprise as a mode of liability still exists in some form or the other in comparative law (notably English law) and international criminal law (although, as was noted, the continued existence of the extended form of joint criminal enterprise beyond the jurisprudence of the ICTY remains doubtful).

The common purpose doctrine serves to alleviate the prosecutorial burden of proving all of the elements of a crime and serves to deal with the “significant societal scourge” that is group criminality. Operating on the premise that the common purpose doctrine reflects the boundaries which courts are comfortable with when circumventing the basic tenets of individual criminal liability, further measures can then be suggested in order to fulfil the State’s policy considerations. These measures will be investigated especially in Chapter 6.

All things considered, this author is cognizant that the common purpose doctrine is likely to stay. Statutory intervention is therefore strongly recommended in the absence of significant judicial interventions which could give definitive parameters for the application of the doctrine in the context of collectives, groups and complex cases involving organised criminality such as criminal gangs where there will always be the temptation to expand modes of liability in order to prosecute and convict as many as possible.



## Chapter 4

# Statutory intervention: The Prevention of Organised Crime Act 121 of 1998

### 4 1 Introduction

This Chapter investigates core legislative interventions by the South African Government in the fight against organised crime in general and specifically criminal gang activities. The focus will be on the Prevention of Organised Crime Act 121 of 1998 (“POCA”). A brief drafting history will be provided in order to determine the broad intent of the Legislature.

The main focus of this Chapter is to construct the substantive offences listed in section 9 POCA, read with the definitions in section 1. A brief overview of the interaction between Chapter 2 and Chapter 4 of POCA will also be provided.

Against this background, it will be evaluated whether the gang-related offences in POCA create criminal sanctions substantially different to the common law (which has also been discussed in Chapter 2 of this dissertation) and whether these sanctions are realising the original legislative intent. It will also be discussed which measures may be taken in order to more effectively realise this intent and better address the phenomenon of criminal gang activity.

### 4 2 Legislative background of POCA

The Prevention of Organised Crime Bill 118 of 1998 (“the Organised Crime Bill”) was introduced to Parliament in 1998. The Bill was drafted by a special task team which was commissioned by the then-Minister of Justice. The main purpose of the task team was to consider proposals that would lead to the implementation of legislation equipped to deal with organised crime and criminal gang activities.<sup>482</sup> This was due to several reasons, especially the State’s inability to deal with the threat of organised crime (generally) and criminal gang activities.<sup>483</sup> This legislative intent was

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<sup>482</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8042-8043. Also see Organised Crime Bill B118-98: The Memorandum on the Objects of the Prevention of Organised Crime Bill 1998 (para 1).

<sup>483</sup> A Standing *Organised crime: A study from the Cape Flats* (2005) 45

later confirmed and echoed in case law. Sachs J, in his separate, concurring opinion in *Mohunram and Another v NDPP and Another (Law Review Project as Amicus Curiae)* (“*Mohunram*”)<sup>484</sup> elaborated on the motivation behind promulgating POCA and described it as a mechanism to mainly deal with two phenomena. It firstly aims to address organised crime, criminal gang activities, money laundering and racketeering which has become a problem globally and is posing a serious security threat within the South African borders.<sup>485</sup> The learned justice held further that South Africa’s common law and statutory law had failed to keep up international standards in dealing with the aforementioned phenomena. In a previous judgment by the Constitutional Court in *National Director of Public Prosecutions and Another v Mohamed NO and Others* (“*Mohamed*”),<sup>486</sup> Ackermann J relied on the long title and preamble of POCA to elucidate its purpose. The growth of organised crime, criminal gang activities,<sup>487</sup> racketeering and money laundering threatens the rights of the inhabitants of the Republic and furthermore endangers economic stability, safety and stability and the public order. The justice also refers to the ineffectual nature of the common law and statutory law and its being out of pace with measures enacted to deal with the aforementioned phenomena. The traditional measures under the common law and statutory law were furthermore ineffectual in dealing with the leaders of organised crime who distance themselves from the actual execution of crimes and furthermore could not be stripped of the unlawful proceeds of their crimes.<sup>488</sup>

The Bill was formulated, based on three core proposals by the Minister. The first proposal was that the participation of organisations in a pattern of racketeering should be criminalised, using the US Racketeer Influenced and Corrupt Organizations Act of 1970 (“RICO”) as the basis of this proposed criminalisation.<sup>489</sup> The legislation should furthermore make provision for criminal and civil asset forfeiture directly against the assets (or *actio in rem*) rather against the accused party which was the *status quo* at

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<sup>484</sup> 2007 (2) SACR 145 (CC).

<sup>485</sup> *Mohunram* para 144.

<sup>486</sup> *Mohamed* para 14.

<sup>487</sup> The preamble specifically states that the “(...) pervasive presence of criminal gangs in many communities is harmful to the wellbeing of those communities, it is necessary to criminalise participation in or promotion of criminal gang activities”.

<sup>488</sup> *Mohamed* 14-15.

<sup>489</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8043. Also see *S v de Vries and Others* 2012 (1) SACR 186 (SCA) (“*de Vries*”) para 43.

the time. Lastly and most relevant to this discussion, is the creation of crimes that criminalise the participation in criminal gang activities.<sup>490</sup> The Minister indicated that the legislation was drafted after conducting a comparative study of foreign jurisdictions as well as measures taken in terms of international law.<sup>491</sup> Other members of parliament alluded to the increasing “criminal culture” in South Africa and due to this decline in morality, which it has become increasingly simpler for criminals to hide within the masses. Organised crime furthermore also threatened the internal political stability and as well as that of the world and that it would not be farfetched to speculate that organised crime would result in a third world war – thus justifying the harsh legislative measures taken in POCA.<sup>492</sup>

During the parliamentary debates regarding the Bill, Willie Hofmeyr referred to former President Nelson Mandela when he stated that the State was preparing to “fight fire with overwhelming fire” in their fight against crime. He furthermore specifically referred to measures relating to criminal gang activities and the “heavy prison sentences” for relatively minor offences.<sup>493</sup> POCA also allows for the forfeiture and seizure of assets that are used in the commission of crime as well as the unlawful proceeds that flow from those activities.<sup>494</sup> The former punishment for drug dealing, it was pointed out, was relatively minor before POCA but now with the racketeering offences, gang leaders could face substantial prison sentences and fines.<sup>495</sup> The Act also addressed the problem of the “individualised nature” of South African criminal law.<sup>496</sup> The common law at that time (bar the common purpose doctrine and to a lesser

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<sup>490</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8043. It was also stated that the scope of the original text was substantially broadened and there was also special mention of the sentence enhancing provisions for engaging in criminal gang activities close to educational institutions.

<sup>491</sup> The international law measures included the Palermo Convention and Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime, Official Journal of the European Union L 300/42 (adopted 24 October 2008, entered into force 24 October 2008).

<sup>492</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8047-8048.

<sup>493</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8051.

<sup>494</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8052.

<sup>495</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8052.

<sup>496</sup> See M Cowling “Fighting organised crime: comment on the Prevention of Organised Crime Bill 1998 (1998) 11 *South African Journal of Criminal Justice* 350 368.

extent conspiracy and incitement) was not focused or developed to deal with organised criminality.<sup>497</sup>

The product of the special task team was an amalgamation of American legislation, namely RICO (which formed the base of the racketeering offences in terms of Chapter 2 of POCA) and the Californian Street Terrorism Enforcement and Prevention Act of 1988 (“STEP”).<sup>498</sup>

RICO was the US Federal Government’s reaction to combat the influx of unlawful proceeds entering into the legitimate economy and create criminal punishments as well as civil remedies.<sup>499</sup> RICO has become infamous due to its far-reaching nature and severe penalties and has thus been subjected to harsh public and academic censure. This criticism includes the stigma of being labelled as a racketeer and this label may not be appropriate in many instances. Furthermore, due to the wide wording (and interpretation),<sup>500</sup> many companies, even if they were factually innocent, plead guilty to alleged RICO offences out of fear for asset freezing and subsequent insolvency.<sup>501</sup>

STEP was enacted in 1988 to address the crisis situation in California brought about by the nearly 600 violent street gangs operating in the state. These gangs were responsible for the individual and collective terrorisation of the citizens of California through their violent criminal acts. The Act specifically references the tremendous 80%

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<sup>497</sup> See See above Chapter 2 (especially 2.2) for further discussions on the individualised nature of criminal law.

<sup>498</sup> Standing *Cape Flats* 45. Also see Cowling (1998) *South African Journal of Criminal Justice* 370. STEP is also partially based on RICO especially in terms of its structure and through the use of patterns to form the basis of liability. See SG Lebeya *Defining organised crime: a comparative analysis* LLD thesis UNISA (2012) 104; DC Van der Linde *’n Patroon van kriminele bende-aktiwiteite: Die oplossing tot Suid Afrika se bendemisdaad of ’n wit olifant? ’n Kritiese, regsvergelende en konstitusionele studie van Hoofstuk 4 van die Wet op die Voorkoming van Georganiseerde Misdaad 121 van 1998* Unpublished LLM dissertation (2015) 9 fn 18.

<sup>499</sup> See *Reves v. Ernst & Young* 507 U.S. 170 (1993) (“*Reves*”) para 11; K Wooster “Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq.—Supreme Court Cases” *American Law Reports Federal* 1 15.

<sup>500</sup> See *Reves* generally on RICO’s so-called “liberal interpretation clause”. Locally, the SCA in *S v Prinsloo* 2016 (2) SACR 25 (SCA) (see para 57) has also adopted this broad and liberal approach to the construction of POCA and especially sections 2(e)-(f).

<sup>501</sup> H Abadinsky *Organized Crime* 6 ed (2000) 403.

increase in gang-related murders from 1986 to 1987.<sup>502</sup> STEP was modelled in part on RICO and was considered pioneering legislation in the US anti-gang movement.<sup>503</sup> Even though STEP is the legislative inspiration for Chapter 4 of POCA, it was originally envisaged to be an independent piece of legislation, namely the Gangsterism Prevention Act.<sup>504</sup> This Act was planned to form part of an anti-gang strategy, which included the structuring of a gang database similar to the Californian equivalent, by the now-disbanded Visible Gang Unit.<sup>505</sup> This proposed Act was however amalgamated with legislation that eventually became POCA.<sup>506</sup>

It is surprising that the text and essence of STEP, for the most part, was transposed into Chapter 4 of POCA despite several constitutional reservations and potential controversies.<sup>507</sup>

Standing posits that anti-gang legislation such as STEP and Chapter 4 of POCA is constructed on two central ideas: Firstly, that traditional criminal law has proven insufficient to curb the phenomenon of criminal gang activities<sup>508</sup> and secondly that the State is justified in providing for more severe punishment for gang-related crimes. When anti-gang legislation is therefore enacted, it is pertinent to criminalise gang membership as well as gang recruitment.<sup>509</sup> Gang membership is not criminalised in STEP nor in POCA as that would constitute a violation of the constitutionally-protected right to freedom of association.<sup>510</sup> Only when gang membership (or active association) is coupled with the substantive offences, it becomes criminal conduct. It is submitted that neither STEP nor POCA functions on those central suppositions.

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<sup>502</sup> § 186.21 of STEP.

<sup>503</sup> JF Sigal "Out of Step: When The California Street Terrorism Enforcement And Prevention Act Stumbles into Penal Code Limits" (2007) 38 *GGULR* 1 10.

<sup>504</sup> A Standing *Organised Crime: A study from the Cape Flats* (2005) 50; 267.

<sup>505</sup> Standing *Cape Flats* 50.

<sup>506</sup> Standing *Cape Flats* 50-51.

<sup>507</sup> See Chapters 4 and 5 for a discussion of these challenges.

<sup>508</sup> The alleged insufficiency of the common law is discussed in detail in Chapter 3 above.

<sup>509</sup> Standing *Cape Flats* 51.

<sup>510</sup> In terms of section 18 of the South African Constitution. The US Constitution, unlike the South African Constitution contains no express provision containing a right to the freedom of association. The US Supreme Court in *NAACP v. Alabama* 377 U.S. 288 (1964) held that this right forms part of the First Amendment (as part of the Freedom of Speech) of the US Constitution.

The Bill, in its final form, was eventually passed “with virtually unanimous support [from Parliament]”.<sup>511</sup> POCA was however not free from controversy due to concerns about potential human rights infringements<sup>512</sup> and limited research on the underlying gang phenomenon. The critics of POCA were however branded as being “soft on criminals” and it was said that the measures contained in POCA were necessary to combat the abovementioned crime types that posed a great threat to the young South African democracy.<sup>513</sup> The perception was therefore that the government was promulgating a potentially unpopular legislative effort but that it was the only way in which the problem could be addressed.<sup>514</sup>

There have been, broadly speaking, three waves in the South African criminal law that have dealt with organised criminality. The first wave is represented in the common law measures and modes of liability that, directly and indirectly, dealt with group-based or organised crime. These measures were mostly discussed in the Chapter 3 above. The common law also provided for other measures including the receipt of stolen property, fraud and defeating the administration of justice.<sup>515</sup> The second wave is represented by various piecemeal legislative measures (mainly in the 1990s)<sup>516</sup> to deal

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<sup>511</sup> *Standing Cape Flats* 45.

<sup>512</sup> See I Kinnes “From urban street gangs to criminal empires” (2000) /SS <<https://oldsite.issafrica.org/uploads/Mono48.pdf>> (accessed 01-11-2015) where the author refers to human rights organisations which protested POCA based the belief that POCA would infringe the freedom of association (section 18 of the Constitution).

<sup>513</sup> *Standing Cape Flats* 46.

<sup>514</sup> *Standing Cape Flats* 46.

<sup>515</sup> See Burchell *Principles of Criminal Law* (2016) 5 ed 891.

<sup>516</sup> Gastrow notes that only in 1991 did the South African Police force make any mention of “organised crime” and start to construct mechanisms to deal with this (“developing”) phenomenon. The author also suggests that this relatively late response to the problem is probably for the reason why, at that time (1998), relatively little research had been conducted on the topic, despite the existence of groups such as the “Boere Mafia” and Chinese Triads in the 1970s and 1980s respectively. See P Gastrow “Organised Crime in South Africa: An Assessment of its Nature and Origins” (08-1998) /SS <<https://issafrica.s3.amazonaws.com/site/uploads/Mono28.pdf>> (accessed 14-11-2016); P Gastrow *Penetrating state and business: Organised crime in southern Africa* vol 2 (2003) 73.

with the rise in the sophistication of organised crime in general.<sup>517</sup> POCA came into force on the 21<sup>st</sup> of January 1999. The Act incorporated parts and also subsequently repealed<sup>518</sup> the Proceeds of Crime Act 76 of 1996<sup>519</sup> and repealed substantial parts of the Drugs and Drug Trafficking Act 140 of 1992.<sup>520</sup> It additionally amended the International Co-Operation in Criminal Matters Act 75 of 1996.<sup>521</sup> POCA thus represents a third wave of measures dealing with organised criminality which is a holistic legislative approach to deal with the phenomenon.

#### 4 3 Interpretative tools assisting in the interpretation of Chapter 4

Before endeavouring an interpretation of POCA, certain interpretive limitations must be stated. There is firstly a great lack of reported case law applying Chapter 4 of POCA. In fact, there is currently only one reported High Court judgment which has successfully employed Chapter 4.<sup>522</sup> Apart from the textual and historical methods (the intent of the Legislature) alluded to above, there is a need for interpretation by analogy, which is done by comparing Chapter 4 of POCA with analogous legislation. The first pertinent example is an internal comparison with the language and structure of Chapter 2 of POCA. Chapter 2 is comprised of a similar structure and also makes use of an underlying pattern to form the basis of criminalisation. Chapter 4 is in fact a subspecies of Chapter 2, considering its legislative history as described above. Chapter 2 has a plethora of reported case law and has been subjected to constitutional

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<sup>517</sup> Burchell points out the Criminal Procedure Act 51 of 1977 (section 35(1)) contained measures to effect the forfeiture of items utilised during the commission of an offence; the Corruption Act 94 of 1992; the Prevention and Combating of Corrupt Activities Act 12 of 2004 which repealed provisions of the former act; the Drugs and Drug Trafficking Act and the Proceeds of Crime Act. See Burchell *Principles* 889-891.

<sup>518</sup> Section 79(c) of POCA.

<sup>519</sup> Also see Burchell *Principles* (2016) 891.

<sup>520</sup> Section 79(b) of POCA. The extent of the amendment is described in Schedule 3 of POCA. Also see S Lottër & L Adendorff "Prevention of Organised Crime Act" in WA Joubert & JA Faris *LAWSA* 8 2 ed (2005) para 344 as well as van der Linde *in Patroon van kriminele bende-aktiwiteite* (2015) 7.

<sup>521</sup> Section 79 of POCA. The extent of the amendment is described in Schedule 2 of POCA.

<sup>522</sup> *S v Thomas* 2015 JDR 1932 (WCC). There will be heavy reliance on this judgment in order to ascertain, to some extent, how courts apply Chapter 4 of POCA. Two unreported judgements are further available: *S v Ceaser and Others* unreported case, no SS29/2009 ("Ceaser") which is of much less interpretive value and *S v Jordaan and Others* WCC 16-11-2017 case no CC20/2017 which provides important insights into the definitions contained in Chapter 1 of POCA.



scrutiny several times and thus offers a ripe judicial basket of case law. The second pertinent example is POCA Chapter 4's parent legislation, namely STEP of California. STEP, which was enacted in 1988, has even more apposite case law. The wording and structure is substantially similar, save for several technical and structural differences. Special care will be taken in the interpretation process due to these differences, as well as the patent and obvious differences in the two jurisdictions. STEP has also been subjected to several constitutional attacks. These attacks will however be discussed in Chapter 5 of this dissertation.

A comparative analysis with international law is also required and this approach is affirmed by section 233 of the Constitution. Section 233 holds that courts must prefer a reasonable interpretation of legislation that is in conformity with international law above an interpretation that is inconsistent therewith. South Africa, further, is a party to the Palermo Convention, which imposes the obligation on member states to promulgate legislation to deal with, *inter alia*, the participation in an "organized criminal group".<sup>523</sup> It will be determined in this section whether Chapter 4 of POCA satisfies its minimum obligations in terms of the Palermo Convention.

The joint action by the council of Europe, making it a criminal offence to participate in a criminal organisation in the Member States of the European Union,<sup>524</sup> shall also be analysed and compared with the Palermo Convention. This analysis will provide definitional assistance as the Palermo Convention echoes the joint convention by creating similar group-based criminal offences.<sup>525</sup>

There will also be reference to the South African common law due to the fact that several of the crimes listed in subsections 9(1) and 9(2) make use of well-established norms, terms, concepts and offences of criminal law.

#### 4 3 1 *Californian Street Terrorism Enforcement and Prevention Act*

STEP provides important guidance on the interpretation of POCA Chapter 4 – which has not been subjected to much judicial scrutiny. It is thus imperative to provide an

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<sup>523</sup> Article 5(1).

<sup>524</sup> Official Journal of the European Communities L 351/1.

<sup>525</sup> See GP Kemp "The United Nations Convention Against Transnational Organized Crime: A milestone in international criminal law" (2001) 14 *South African Journal of Criminal Justice* 152 155-156.

overview of the most pertinent provisions of STEP.<sup>526</sup> Relevant and comparable aspects will be discussed under the corresponding sections of POCA below.

The main substantive offence is contained in section 186.22(a) of STEP and provides the following:

Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who wilfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

POCA is inspired by STEP as it also incorporates the scheme of predicate offences. A “pattern of criminal street gang activity” is defined under section 186.22(e) of STEP as

(...) the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons (...)

The full list of these offences is contained in Addendum A of this dissertation but includes crimes that are logically and traditionally associated with gangs. This includes assault with a deadly weapon,<sup>527</sup> robbery,<sup>528</sup> homicide and manslaughter;<sup>529</sup> the sale (or possession with the intent to sell), manufacturing or transportation of certain “controlled substances”;<sup>530</sup> rape<sup>531</sup> and several firearm-related offences.<sup>532</sup>

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<sup>526</sup> As also pointed out above, STEP is based on the US RICO statute. The SCA in *de Vries* at para 43 (*cf Prinsloo* para 58) acknowledged the “considerable assistance” RICO jurisprudence provided in the interpretation of Chapter 2 of POCA. The SCA also noted its surprise that neither party to the case had relied on a body of case law. Despite this remark coming across as mostly obiter – the omission is nevertheless quite notable. It was also patent to note the complete lack of reliance on STEP in *Thomas* – especially considering that *Thomas* was a landmark judgement in the context of Chapter 4 of POCA.

<sup>527</sup> Section 186.22(e)(1).

<sup>528</sup> Section 186.22(e)(2).

<sup>529</sup> Section 186.22(e)(3).

<sup>530</sup> Section 186.22(e)(4).

<sup>531</sup> Section 186.22(e)(12).

<sup>532</sup> Section 186.22(e)(5)-(6); (22)-(23), (31)-(33).

STEP also provides for sentence enhancements. These enhancements shall be discussed below.<sup>533</sup> Before we get to that, it is necessary to contextualise the comparative law with reference to applicable international law – specifically the Palermo Convention. This is done because South Africa adopted POCA shortly before it assented to the Palermo Convention. So the question is whether POCA was prompted by the imminent signing of the Palermo Convention, or the inspiration found in STEP, or both.

#### 4 3 2 *The Palermo Convention*

The predominant international obligation of South Africa pertaining to organised crime, emanates from the United Nations Convention Against Transnational Organized Crime<sup>534</sup> (“the Palermo Convention”).<sup>535</sup> South Africa assented to the treaty on the 14<sup>th</sup> of December 2000.<sup>536</sup> POCA, the predominant means of giving effect to the goals stated in the Palermo Convention, came into force on the 21<sup>st</sup> of January 1999. Article 1 of the Palermo Convention broadly states the purpose of the Convention, namely to “(...) promote cooperation to prevent and combat transnational organized crime more effectively”. Thus, the purpose of the Convention is not merely to criminalise the acts relevant to organised crime but recognises their transnational nature by placing a strong focus on inter-country cooperation.<sup>537</sup> Article 5(1)(a) (“legislative and other measures”) read with article 34(1) (“legislative and administrative measures”) places an obligation on states parties to implement their

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<sup>533</sup> See 4 5 3 below.

<sup>534</sup> United Nations General Assembly Doc A/RES/55/25.

<sup>535</sup> See Parliamentary Monitoring Group “Revised Explanatory Memorandum: Ratification of The United Nations Convention Against Transnational Organized Crime (The Convention) and Protocols Thereto” (2003) <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2003/appendices/031024unmemo.htm>> (accessed 05-08-2017).

<sup>536</sup> United Nations “12. United Nations Convention against Transnational Organized Crime” *United Nations* (04-08-2017) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en)> (accessed 05-08-2017).

<sup>537</sup> GP Kemp “The United Nations Convention Against Transnational Organized Crime: A milestone in international criminal law” (2001) 14 *South African Journal of Criminal Justice* 152 153; S Betti “New prospects for inter-state co-operation in criminal matters: The Palermo Convention” (2003) 3 *ICLR* 151 153.

obligations under the Palermo Convention in their domestic legislation.<sup>538</sup> Common law crimes and modes of liability are probably not enough to satisfy this rather specific requirement.

At the time of becoming party to the Convention, POCA was already in force. POCA was therefore not crafted in line with or giving effect to the Palermo Convention *per se*. Compliance with the Convention seems to be assumed<sup>539</sup> but textual compliance with the requirements of the Convention is uncertain. The text of POCA must therefore be scrutinised to determine whether it fulfils its obligations under the Palermo Convention.

It is clear, despite this chronological technicality, that South Africa has in fact adopted “legislative and other measures” to establish criminal offences. The definition of a criminal gang in section 1 of POCA differs substantially from Article 2(a) of the Convention.

Article 2(a) states that an organized criminal group

shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit [.]

Article 2(a) implies a peremptory definition by using the word “shall mean” at the beginning of the definition. The group must also exist for a period of time thus excluding groups that have formed spontaneously. The benefit may also be other than financial and may extend to benefits that are not financial in nature by including “other material benefit” such as benefits of a sexual nature such as children obtained through

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<sup>538</sup> Article 5(1)(a) pertains to participation in an organised criminal group where article 34 places a general obligation on states parties. Article 34 further states these measures must be in accordance with the domestic laws of each states party and that states may adopt “more strict or severe measures” than the ones provided in the Convention. The cumulative effect of not only these provisions but the others mentioned is that the Convention sets a minimum standard from which states may not deviate but seem free to set harsher conditions, within the bounds of the Convention. A state party may not, for example, set a stricter standard as *mens rea*, such as negligence.

<sup>539</sup> See United Nations on Drugs and Crime “Database of Legislation” (07-10-2016) *UNODC* <[https://www.unodc.org/cld/legislation/zaf/prevention\\_of organised\\_crime\\_act\\_121\\_of\\_1998/chapter\\_4/section\\_9-11/chapter\\_4.html?lng=en](https://www.unodc.org/cld/legislation/zaf/prevention_of organised_crime_act_121_of_1998/chapter_4/section_9-11/chapter_4.html?lng=en)> (accessed 20-10-2017).

human trafficking.<sup>540</sup> “Serious crime” is defined in article 2(b) and means conduct that would attract imprisonment of a minimum of four years “or a more serious penalty”.

South Africa is not bound by this definition, but as a signatory to the Convention, should satisfy the gist of the instrument.<sup>541</sup> Section 233 of the Constitution also states that a “(...) court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.<sup>542</sup> Certain discrepancies therefore warrant further discussion.

Article 2(b) uses the standard of “serious crime” to indicate the types of crimes that should qualify as predicate offences and that those crimes must carry at least a potential four-year prison sentence. POCA makes use of a myriad of crimes that would render a gang a “criminal gang” in terms of section 1, read with Chapter 4 of the Act. The extremely broad list of 37 (“predicate”) offences listed in Schedule 1 of POCA covers a vast array of offences, which, for the most part, are associated with activities usually associated with criminal gangs. This includes offences such as murder, rape, public violence, robbery and sexual assault.<sup>543</sup>

Items 21 and 26 of the Schedule 1 of POCA respectively list “offences relating to coinage” and “any offence relating to exchange control”.<sup>544</sup> Section 34(1)(f) of the South African Reserve Bank Act 90 of 1989 (“the Reserve Bank Act”), as amended, makes the act of soiling, damaging or attaching drawings to a coin which is legal tender an offence. The penalty for such an offence “a fine not exceeding R250”.<sup>545</sup> This is

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<sup>540</sup> See General Assembly of the United Nations *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (Addendum) Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto A/55/383/Add.1* 2.

<sup>541</sup> See generally United Nations Office on Drugs and Crime “Legislative Guides for The Implementation of The United Nations Convention against Transnational Organized Crime and The Protocol Thereto” (2004) *United Nations Office on Drugs and Crime* <[http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)>.

<sup>542</sup> See generally J Dugard *International Law: A South African Perspective* 4 ed (2011) 62-68; TW Bennett & J Strug *Introduction to International Law* (2013) 36.

<sup>543</sup> See Addendum A of this dissertation.

<sup>544</sup> The inclusion of these offences in Schedule 1 will also be discussed in Chapter 5 below in a constitutional context. Also see W Freedman “Recent cases” (2014) 3 *South African Journal of Criminal Justice* 466 473.

<sup>545</sup> Section 34(iv) of the Reserve Bank Act.

clearly out of touch with the type of offence envisaged in article 2(b) of the Convention. It is submitted that the seriousness of these offences is so infinitesimal, that they may even qualify as a basis for the defence of *de minimis non curat lex*.<sup>546</sup> The appropriateness of such offences, amongst crimes such as rape, murder, arson and even offences in terms of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, is open to severe doubt and seems illogical.

Article 2(c) defines a “[s]tructured group” as meaning a group that was not formed for the commission of specific offences. Structured groups may be organised both in a traditional sense with “formally defined roles” in a hierarchal fashion or those in a loose fashion with no defined roles or duties.<sup>547</sup> There is also no need for a “continuity of membership” which is inevitable with gang members being in and out of prison, murdered or, to a far lesser extent, leave the gang.

Article 5(1)(a) and (b) criminalises the participation in an organized crime group. States parties are required to “adopt legislative and other measures” criminalising the intentional participation in an organized criminal group. The suggested models must occur through:

- (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
  - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the

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<sup>546</sup> This maxim means that the law does not concern itself with trivialities. Practically, a court would consider the unlawful conduct of the accused to remain unpunished due to its trivial nature and the accused may raise it a defence although it is not a ground of justification in the strict sense. See Burchell *Principles* 245-247; G Kemp, S Walker, R Palmer, D Baqwa, C Gevers, B Leslie & A Steynberg *Criminal Law in South Africa* 2 ed (2015) 147-149. Kemp et al point to the Canadian case in *Canadian Foundation for Children, Youth and The Law v Canada (Attorney-General)* 2004 SCC 4 at para 204. Here, the Supreme Court of Canada that *de minimis* is founded mainly on three justifications. Firstly, the application of criminal law (and subsequent criminal sanction) to serious misconduct. Secondly, it protects an accused from severe criminal sanctions and for trivial conduct and additionally protects an accused from the stigma associated with such sanctions. It thirdly prohibits the criminal justice system from becoming swamped (which is equally true, probably even more so in South Africa).

<sup>547</sup> General Assembly of the United Nations *Report of the Ad Hoc Committee 2*

- participants in furtherance of the agreement or involving an organized criminal group;
- (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
  - a. Criminal activities of the organized criminal group;
  - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;
- (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.
- 2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.
- (...)

The model most closely akin to South Africa's model is article 5(1)(b). South Africa is obliged, as mentioned above, to enact *legislative* measures to deal with organised criminal groups. It is submitted that, on a literal reading of this obligation, common law measures, in particular the common purpose doctrine, will therefore not pass the muster of article 5(1). The article also prescribes that the criminal offences be committed *intentionally*. It does not specify which form of intention will suffice but negligence would be excluded. Intention in the form of *dolus directus*, *dolus indirectus* as well as *dolus eventualis* all seem to be appropriate forms of intent. Article 5(1) read with article 5(2) does not have a set standard of intent for the underlying offences. Intention is not required pertinently in each of the substantive crimes in POCA Chapter 4 but can be construed as such. There are however problematic instances where the determination of the requisite *dolus* requires a strong reliance on inferences from the textual context.<sup>548</sup> The intention standard in article 5(1)(a) at a minimum requires proof that the accused had joined the criminal organisation in pursuance of furthering or supporting the criminal conduct of the accused.<sup>549</sup> It seems improbable that this

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<sup>548</sup> See 4 5 2 ff. for a discussion on the requisite *dolus* for each of the enumerated crimes under Chapter 4 of POCA.

<sup>549</sup> Kemp (2001) *South African Journal of Criminal Justice* 156.



standard, on the face of it, can be reconciled with POCA as the definition of criminal gang does not require such knowledge.

It can equally as convincingly be argued that a formal gang member may share a common purpose with the rest of the gang to further that gang's criminal conduct and the same can also most likely be said of a gang member who actively associates with that same gang. Someone who actively associates him- or herself with a gang, logically wants to further whatever criminal endeavour they are partaking in – possibly, in some instances, even more so. A member who actively associates themselves (and is not a formal member) is not bound by “formal” membership and selects activities he or she wants to partake in and may have more leeway than someone who is bound by formal gang membership. His or her mere conduct of *actively associating* with the gang provides evidence of the intention to further the gang's operation. A formal gang member's initial formal joining of the gang and participation in induction rituals,<sup>550</sup> may serve as proof of serious intention to further the criminal activities of the gang.

#### 4 3 3 *Council Framework Decision by the Council of the European Union*

The Council of Europe adopted a joint decision making it an offence to participate in an organised criminal group within the member states of the European Union.<sup>551</sup> A subsequent Council Framework Decision 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime (“Framework Decision”),<sup>552</sup> repealed this joint decision in 2008.<sup>553</sup> The joint action and subsequent Framework Decision is comparable to the Palermo Convention in that it creates similar group-based criminal offences.<sup>554</sup> The textual comparability with the Palermo Convention makes it relevant to look at the Council Decision, also from a South African perspective.

Article 1(1) of the Framework Decision states that a criminal organisation

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<sup>550</sup> See especially 4 5 2 6 below.

<sup>551</sup> Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, Official Journal of the European Communities L 351/1 (adopted on 21 December 1998).

<sup>552</sup> Official Journal of the European Union L 300/42 (adopted 24 October 2008, entered into force 24 October 2008).

<sup>553</sup> Paragraph 9 of the Decision Framework.

<sup>554</sup> See Kemp (2001) *South African Journal of Criminal Justice* 155-156.

means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit

The Decision Framework adopts a fixed albeit wide definition of criminal organisation. This type of definition stands in stark contrast to the definition of “criminal gang” under POCA which adopts a directory definition by employing the word “includes” at the beginning of the definition.<sup>555</sup> Article 1(1) (“established over a period of time”) and 1(2) (“not randomly formed”) also explicitly excludes the inclusion of groups formed sporadically from the definitions, thereby also excluding criminal organisations that have formed for a specific mandate. Such sporadic or randomly formed groups are still possible under POCA due to the discretionary wording of the definition of criminal gang.

Even though this definition is substantially similar to article 1 of the joint decision, it does not, for example, include the improper influencing of public official under the definition. The joint decision did also not include a further definition of “structured organisation”. Article 1(2) holds that a “structured organisation”

means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure.

The adoption of a regional protocol may seem odd due the large number of EU countries that are also member states to the Palermo Protocol and due to the fact criminal organisations do not only operate within a regional context but transnationally as well.<sup>556</sup>

#### 4 3 4      *The Canadian Criminal Code*

The Canadian Criminal Code (“the Code”) outlaws certain groups (or “criminal organizations”) through the prohibition of certain criminal acts in association with that organisation. The usefulness of the Canadian approach for South Africa is in certain

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<sup>555</sup> See Chapter 5 for a comprehensive discussion on this issue.

<sup>556</sup> United Nations Office on Drugs and Crime *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (2004) 21 where the United Nations Office on Drugs and Crime (UNODC) also points out this fact.

textual aspects that may prove instructive or insightful for purposes of interpretation and potential legislative reform.

A “criminal organization” is defined in section 467.1(1) of the Canadian Criminal Code and

*means* a group, however organized, that (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

Certain important observations are appropriate here. The Code also uses the word “means” at the beginning of the definition thus avoiding claims of vagueness – at least in this particular regard. Secondly, the main activities requirement calls for the commission of one or more serious offences under the Code “or any Act of Parliament”. Canada, unlike the US and South Africa, does not rely on a fixed list of predicate offences but relies on a broader category of “serious offences”.

A “serious offence”

means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation [.]<sup>557</sup>

The Code also pertinently states that the “criminal organization” must have one of its *main activities* the facilitation and commission of these serious offences. POCA, in contrast, merely refers to “one of its activities”. This must be contrasted against the requirement under STEP which has developed more concrete case law on this point.<sup>558</sup>

There will be consistent reference throughout this dissertation to the fact that Schedule 1 to POCA, which contains the relevant predicates acts, is so wide and varied in nature, possibly to the extent that it renders the list unconstitutionally vague and uncertain.<sup>559</sup>

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<sup>557</sup> Section 467.1(1) of the Code.

<sup>558</sup> See 4 5 1 1 2 below.

<sup>559</sup> See especially 4 5 1 2 1 as well as 5 3 2 2-5 3 2 4 below.

## 4 4 Chapter 2 of POCA: Racketeering offences

### 4 4 1 Chapter 2 in the context of criminal gangs

Chapter 2 of POCA attempts to address a previous *lacuna* in the law, namely effective means to hold those involved in the management and participation in criminal enterprises criminally responsible and to strip them of their unlawful proceeds of crime.<sup>560</sup> Holding the masterminds of these enterprises criminally responsible has proved to be especially difficult under the common law due to the aforementioned masterminds distancing themselves from the actual commission of the crimes that generate the unlawful proceeds.<sup>561</sup> This then creates a cloak of criminality shielding the participants of organised crime from prosecution.

Kemp notes the importance of facilitating transnational cooperation when dealing with organised crime. The underlying crimes often spread over national borders and also are not inherently equipped to deal with the phenomenon.<sup>562</sup> There are often several layers to organised criminality. Top tiers of so-called “supergangs”<sup>563</sup> may start to manifest in something akin to an international crime syndicate.<sup>564</sup> These gangs are “super” not only due to their size but also due to their stronghold over several territories. Pinnock describes how merchant gangs also have a hierarchal and business-like structure. Their top echelon is organised while the middle echelon is semi-structured. The lowest tier is “fluid and volatile”.<sup>565</sup> The middle echelon often manages the illicit business interests and instructs the bottom tier.<sup>566</sup> The top echelon yields exceptional influence and power and is, in fact, often linked to international syndicates through supply chains.<sup>567</sup> The lowest echelon is the focus of this

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<sup>560</sup> See the preamble to POCA; Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8044.

<sup>561</sup> See the preamble to POCA.

<sup>562</sup> Kemp et al *Criminal Law* 511. Also see P Gastrow *Penetrating state and business: organised crime in Southern Africa* (2003) 72.

<sup>563</sup> See Standing *Cape Flats* 103. These included gangs such as the Sexy Boys, Fancy Boys, the Americans and the Hard Livings.

<sup>564</sup> See D Pinnock *Gang Town* (2016) 98-100.

<sup>565</sup> Pinnock *Gang Town* 118.

<sup>566</sup> A Standing “Re-Conceptualising Organised Crime” (2003) 12(3) *African Security Review* 102 105. The persons at the middle tier are in certain contexts known as “area generals”.

<sup>567</sup> See Pinnock *Gang Town* 98; 118.

dissertation, as they are the part of the hierarchy that is responsible for violence terrorising communities, especially in the Western Cape. Standing notes that this level of the hierarchy usually does not benefit from the fruits of the illicit gains and are more often rather the consumers of the illicit products.<sup>568</sup> This type of gang often supplies illicit goods (especially drugs) to so-called emerging gangs. Emerging gangs are not as strong in number or organisation and mostly operate in community context.<sup>569</sup> This symbiotic relationship is therefore beneficial to both parties as the larger, merchant-type gangs are enriched while the emerging gangs are also enriched and additionally receive protection from the larger gang as they promote their financial interests. Although gangs do vary in their organisational structure and hierarchy, it is clear from these observations of Pinnock that South African gangs can function in an extremely organised and hierarchal fashion.<sup>570</sup>

There is often a conceptual separation between racketeering and money laundering offences on one side and gang activities on the other. This is also evident in the Legislature's approach in criminalising these "categories" of crimes separately in POCA. So-called white-collar criminals are contrasted with street criminals.<sup>571</sup> The separation can perhaps be justified based on the *types* of crimes the relevant chapters aims to punish; more specifically economic crimes on the one hand and violent crimes on the other. Criminal gangs however invest the fruits of their criminal labour in the legitimate economy for money laundering purposes.<sup>572</sup> Criminal gangs, through the sale of drugs and alcohol, prostitution, human trafficking, robbery and theft, launder their money by investing in the legitimate economy through night clubs, shops and public transport, amongst other things.<sup>573</sup> Criminal gangs moreover supplement the economy of disenfranchised communities by providing a source of income to those

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<sup>568</sup> Standing (2010) *African Security Review* 105.

<sup>569</sup> Standing (2010) *African Security Review* 105-106.

<sup>570</sup> Pinnock *Gang Town* 104-106.

<sup>571</sup> See Pinnock *Gang Town* 99-100. The author also mentions this distinction and points towards the "worrying amnesia" when it comes to racketeering in international corporations while there is a focus on violent organised crime.

<sup>572</sup> M Wijnberg *Exploration of Male Gang Members' Perspectives of Gangs and Drugs* MA (Social Work) thesis University of Stellenbosch (2012) 28; Cowling (1998) *South African Journal of Criminal Justice* 368; Standing (2010) *African Security Review* 105.

<sup>573</sup> TR Samara *Cape Town after Apartheid: Crime and Governance in the Divided City* (2011) 97.

who otherwise feel that they cannot contribute through legitimate means.<sup>574</sup> This in fact creates a paradoxical situation: Those terrorising a community often provide a source of income to members of the very same area.<sup>575</sup>

Pinnock echoes these sentiments. He summarises the problem as follows:

Even under POCA legislation it's difficult for police to arrest gang leaders. They rule by word and not deed, avoid using drugs, keep organisationally 'clean' and enforce these rules of behaviour on men in their upper hierarchy. Excess money is laundered through legitimate businesses.<sup>576</sup>

Thus the need for legislation enabling the state to target these illegal gains.<sup>577</sup> This type of legislation inhibits a criminal gang's ability to function properly and also serves as a disincentive for fellow gang members or those who want to engage in criminal gang activities.<sup>578</sup>

#### 4 4 2      *An overview of sections 2(1)(e) and (f)*

Just as with Chapter 4 of POCA, Chapter 2 has certain key definitions. An "enterprise" for purposes of Chapter 2 of POCA

*includes* any individual, partnership, corporation, association, or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity [.]<sup>579</sup>

The definition of this key term also (just as in Chapter 4) uses the word "includes" and it is submitted that this also creates a mere directory definition, just as with the definition of "criminal gang". This definition would thus also be susceptible to constitutional attack.<sup>580</sup>

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<sup>574</sup> See *Samara Cape Town after Apartheid* 99-100.

<sup>575</sup> See *Samara Cape Town after Apartheid* 100. The author also refers to research by Steve Kibble, indicating that gangs often also provide financial support (such as rent or grocery money), thereby making certain community members dependent on them.

<sup>576</sup> *Pinnock Gang Town* 110.

<sup>577</sup> See *Standing Cape Flats* 266.

<sup>578</sup> *Standing Cape Flats* 266.

<sup>579</sup> Own emphasis.

<sup>580</sup> See 5 3 2 2 below for a detailed discussion on the constitutionality of the term "criminal gang".

The State must furthermore show that an accused has committed a pattern of racketeering activity. This

*means* the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1 [.]<sup>581</sup>

It is interesting to note that this definition very clearly uses the word “means” at the beginning of the definition. This creates a closed or peremptory definition which is not as susceptible to prosecutorial abuse or offending the *ius strictum* aspect of the principle of legality.

For purposes of this discussion and the discussion of Chapter 4 offences, it is also important to note section 1(3), which states:

For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both

- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has

This section will only provide an overview of sections 2(1)(e) and (f) due to their application in gang-related decisions.

Section 2(1)(f) creates the so-called management offence. This offence is contravened when a person

manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity [.]

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<sup>581</sup> Own emphasis.



This offence requires actual participation in the racketeering enterprise.<sup>582</sup> There is however a relatively low threshold of *mens rea* because it is sufficient for the State to prove that the accused was negligent in his or her conduct. The SCA in *S v Prinsloo* (“*Prinsloo*”),<sup>583</sup> after an analysis of the relevant authority and legislative intent,<sup>584</sup> concluded that it was clear that *culpa* was sufficient to secure a conviction based on this section.<sup>585</sup>

A definition for the term “manages”, just like the concept of membership in Chapter 2, is also absent in the statute. Kemp et al suggest that the ordinary meaning of this term be attached and that some sort of *de facto* manager is required and formal employment should certainly not be required.<sup>586</sup>

The definition also requires direct or indirect participation in the affairs of the enterprise. Although US jurisprudence indicates that this definition does not extend to people outside of the association, it has been submitted that the scope of the term “indirectly” is broad enough to include such categories of persons.<sup>587</sup> The requisite pattern of racketeering activity can be fulfilled only by personal commission of the underlying predicate offences.<sup>588</sup> This differs substantially from the position under Chapter 4, where personal commission of the predicate acts is not required. Members may individually or collectively contribute to the pattern. It is uncertain why such a distinction is made between the two statutes. Chapter 2 thus seems to be in line with the traditional concepts of criminal law, whereas Chapter 4, just like the common

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<sup>582</sup> See generally Kemp et al *Criminal Law* 521; Standing *Organised Crime* (2013) 15-16.

<sup>583</sup> 2016 (2) SACR 25 (SCA).

<sup>584</sup> See for example section 1(3) of POCA which states that

For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

- (a) the general knowledge, skill, training, and experience that may reasonably be expected of a person in his or her position; and
- (b) the general knowledge, skill, training and experience that he or she in fact has.

<sup>585</sup> See *Prinsloo* paras 51-54. Kemp et al also posit that the wording of the statute would necessarily also exclude instances of “wilful blindness” or ignorance. See Kemp et al *Criminal Law* 520-521.

<sup>586</sup> Kemp et al *Criminal Law* 519.

<sup>587</sup> Kemp et al *Criminal Law* 519-520.

<sup>588</sup> See Kemp et al *Criminal Law* 520.

purpose doctrine, constitutes a substantial modification of the principle of personal guilt.<sup>589</sup>

Another aspect that also differs from Chapter 4 of POCA, is that there has to be some kind of nexus (or “participatory link”) between the pattern of racketeering activities and the criminal enterprise and thus accidental, unrelated or coincidental commission of criminal offences would not be sufficient to sustain a conviction.<sup>590</sup> This does not appear to be the position under Chapter 4 of POCA, where the participation in the enterprise does not have to be “through”<sup>591</sup> the predicate acts. The underlying predicate acts under Chapter 4 do not appear to have the same requirement: only the substantive offences require there to be some connection (or benefit in some instances).

Section 2(1)(e), on the other hand, states:

whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity [.]

This offence contains largely the same essential elements as subsection (f). A significant difference is, however, that there is no mention of the requisite *mens rea* here. In the absence of a direct reference to the requisite form of *mens rea*, there is a presumption that statutory crimes require *dolus* in one of its three forms.<sup>592</sup> The SCA in *Prinsloo* held that the mere commission of the underlying predicate offences would satisfy the elements of subsection (e) and that the State would consequently not have to prove anything beyond that.<sup>593</sup> This position differs substantially from what is required under Chapter 4. Each of the section 9 offences (under Chapter 4) requires specific and separate conduct from the underlying predicate offences. The

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<sup>589</sup> See Chapter 2 for a discussion on the concept of personal guilt. Kemp et al refer to *obiter* remarks by the Gauteng South Division of the High Court in *Boekhout v S* (unreported case, no SS134/06) where the Court held that personal commission of the predicate offences was not required – mere involvement in the commission of those offences would suffice. The author also points out that this position is inconsistent with RICO jurisprudence. See Kemp et al *Criminal Law* 520 fn 42.

<sup>590</sup> See *Savoi I* para 111; *Eyssen II* para 8. Also see See Kemp et al *Criminal Law* 520.

<sup>591</sup> See Kemp et al *Criminal Law* 521.

<sup>592</sup> See Burchell *Principles* 900.

<sup>593</sup> *Prinsloo* at para 64. Also see Burchell *Principles* 900 fn 11.

commission of the predicate offences, thus, has to be followed by the commission of a predicate offence with its own accompanying *actus reus*.

Burchell points out that the position held in *Prinsloo* is not congruent with the position held by the KwaZulu-Natal division of the High Court in *Savoi I* and that intent is an “inescapable” element with regards to all racketeering offences.<sup>594</sup>

#### 4 4 3 Case studies: *S v Eyssen* and *S v Thomas*

##### 4 4 3 1 *S v Eyssen*

The SCA in *S v Eyssen* (“*Eyssen II*”)<sup>595</sup> heard an appeal relating to two counts of racketeering in terms of sections 2(1)(e) and (f) of POCA.<sup>596</sup> The State argued that the requisite “enterprise” was that of the Fancy Boys gang and that the business of that gang was mainly the robbery of homes.<sup>597</sup> The Court considered the available (albeit limited) evidence on the aforementioned gang which all pointed towards the fact that the so-called enterprise was factually non-existent. There was a lack of hierarchical structure and the “members” were not necessarily members of the gang due to their crimes being for personal gain and not that of the alleged enterprise. Due to this, the SCA rejected the State’s submission that the Fancy Boys constituted an enterprise for the purposes of Chapter 2 of POCA.<sup>598</sup> This additionally illustrates the difficulty in trying to criminalise gang activity on the assumption that the gang members function as a cohesive unit and underlines the fact that “gangs” may engage in venture-specific activities and dissolve immediately thereafter.<sup>599</sup> The SCA furthermore rejected the State’s contentions that the underlying predicate offences (consisting of three common law offences) which formed the pattern of racketeering activity formed part of the activities of the gang. All of the offences involved multiple persons and only in one instance gang membership was established and with the other instances (where the accused parties were apprehended), no established gang members were involved.<sup>600</sup>

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<sup>594</sup> Burchell *Principles* 900-901.

<sup>595</sup> 2009 (1) SACR 406 (SCA).

<sup>596</sup> See *Eyssen II* paras 1-3.

<sup>597</sup> See *Eyssen II* para 13.

<sup>598</sup> See *Eyssen II* para 13.

<sup>599</sup> See 4 5 1 1 below and P Gastrow “Organised Crime in South Africa – An Assessment of its Nature and Origins” *ISS*.

<sup>600</sup> See *Eyssen II* para 14.

Submissions that the appellant managed the affairs of the Fancy Boys gang were similarly rejected by the Court.

#### **4 4 3 2      *S v Thomas***

The Western Cape Division of the High Court in *S v Thomas* (“*Thomas*”)<sup>601</sup> found that Accused 1 was guilty of the charged racketeering offences. The *Thomas* case is the most significant gang-related case involving Chapters 2 and 4 of POCA. The State had originally charged nineteen people with 166 gang-related crimes – not only under POCA – but also with common law crimes such as murder, assault, conspiracy, incitement as well as various gun-related charges under the Firearms Control Act 60 of 2000 and offences under the Drugs and Drug Trafficking Act 140 of 1992.

The State argued that Accused 1 managed the affairs of the 28s criminal gang (the criminal enterprise) in terms of section 2(1)(f) of POCA. It was furthermore alleged that he knew that several of his co-accused were in service of this criminal enterprise which (directly or indirectly) contributed to a pattern of racketeering activities.<sup>602</sup> The evidence revealed that the accused was a high-ranking (or even highest-ranking) member of the gang and that various crimes were executed on his instruction.<sup>603</sup> The Court consequently found, beyond a reasonable doubt, that Accused 1 was in control (thus “managed”) the affairs of the enterprise (the 28s gang) since he became a member of the gang.<sup>604</sup> This was despite the accused’s unsuccessful attempt to argue that his position within the gang did not place him in such a managerial position. The Court also noted that it was in any case not relevant which rank the accused held. The relevant question was whether he was in a *de facto* position to give orders and whether he had in fact given such orders.<sup>605</sup>

The Court additionally found Accused 1 guilty of contravening subsection (e) due to his direct as well as indirect participation in four murders.<sup>606</sup> The accused’s

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<sup>601</sup> 2015 JDR 1932 (WCC).

<sup>602</sup> *Thomas* at 480-482.

<sup>603</sup> *Thomas* at 480-483. The evidence showed that the accused went by several aliases which included “Ndoda” and “Die Ou” which indicated his leadership position. Also see *Ceaser* at 16.

<sup>604</sup> *Thomas* at 512.

<sup>605</sup> See *Thomas* 511-512.

<sup>606</sup> *Thomas* at 515. The SCA in *Prinsloo* recently confirmed that this it was possible to hold someone liable both in terms of subsections (e) and (f) after an unsuccessful challenge by one of the accused parties. See *Prinsloo* paras 56-60.

responsibility was unusual in the sense that he, as a gang leader, also committed crimes on “street level”.<sup>607</sup>

The other accused parties were not convicted so easily.<sup>608</sup> This was mainly due to a lack of evidence to form the requisite pattern of racketeering activities.<sup>609</sup> There were however some convictions. Accused 16 was, notably, convicted despite the fact that membership (or “employment”) of the 28s gang was not proven but membership to *another* gang (the 26s) was proved. The Court accepted the State’s evidence that he contributed to the enterprise of the 28s gang. This position is correct and is in line with the clear and ordinary meaning of subsection (f) which requires either direct or indirect (as with Accused 16) participation in the enterprise.<sup>610</sup>

Why was the Court in *Thomas* able to find the accused guilty of racketeering offences and not the Court in *Eyssen*? The main difference is that there was substantial evidence indicating the accused’s position of authority in *Thomas*, thus satisfying the managerial element in the offence. There was also, unlike in *Eyssen*, sufficient evidence that the activities of the 28s constituted the requisite “enterprise”.

#### 4 4 4      Section 2(2)

Section 2(2) of POCA importantly provides that

[t]he court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

This is a crucial provision in POCA. The section however resorts under Chapter 2 and not to gang-related related matters. Nowhere in the Act is it explicitly stated that a court has the same liberties in relation to gang-related matters as with racketeering under Chapter 2, despite the fact that Chapter 4 is almost wholly founded on the concept of utilising a pattern of criminal gang activity, which is, in turn, founded on previous

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<sup>607</sup> See *Thomas* at 481.

<sup>608</sup> In terms of subsection (e).

<sup>609</sup> See *Thomas* 515-520. With regards to Accused 6, on the other hand, the Court was not satisfied that the State proved that the relevant crimes were executed at the direction of Accused 1. In other words, it was not shown that the crimes were committed for the enterprise *through* the pattern of racketeering activities.

<sup>610</sup> See Kemp et al *Criminal Law* 520 and the discussion above.

convictions. Although this oversight is somewhat of an anomaly, it does not appear if it is an impediment to the utilisation of Chapter 4. Section 211 of the Criminal Procedure Act 51 of 1977 (“the CPA”) also provides general authorisation for the proof of previous convictions in criminal trials.<sup>611</sup> In order to avoid future challenges to Chapter 4, a provision similar to section 2(2) should be added to Chapter 4.<sup>612</sup>

#### 4 4 5 *Evaluation*

It is clear that the *business* of gangs is inextricably linked to criminal gang activities. A conceptual separation of the “types” of criminals who perpetrate either racketeering or gang-related activities is not justified. In order to effectively battle organised crime, in all its permutations, the State needs to strip an organised criminal group of its illicit gains; punish the participation in illicit business activities and thirdly attempt to dismantle the organised structure.

#### 4 5 Chapter 4 of POCA: Gang-related offences

##### 4 5 1 *The preliminary requirements in terms of Chapter 1*

Certain preliminary requirements must be proven before a conviction under Chapter 4 of POCA may be secured. A court must firstly be satisfied that the individuals concerned are members of or active participants in a criminal gang.<sup>613</sup> There must secondly be proof that these alleged members individually or collectively contributed

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<sup>611</sup> Section 211 reads that

[e]xcept where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so convicted.

It can therefore be argued that the “pattern of criminal gang activity” is an element of the offences under Chapter 4 of POCA. Section 197(d) further permits the State to question the accused regarding his or her previous convictions if it can prove that “he [or she] has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he [or she] is charged”.

<sup>612</sup> See 7 2 below.

<sup>613</sup> It is however submitted that active participation will often constitute *de facto* gang membership even if there is no formal gang membership.

to a pattern of criminal gang activities. Chapter 1 (section 1) of POCA defines these concepts.

#### **4 5 1 1 “Criminal gang”**

A brief overview of leading conceptualisations of the concept of a criminal gang was provided in the introductory chapter of this dissertation.<sup>614</sup> The focus of this dissertation and the function of Chapter 4 of POCA is reliant on the definition of a “criminal gang” in POCA. Chapter 1 of POCA defines a criminal gang as follows:

*includes any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity [.]*<sup>615</sup>

This definition makes use of the word “includes” before the description of a criminal gang. The use of this word tends to indicate that a definition is merely of a directory and not peremptory nature. This creates great legal uncertainty as well as constitutional issues which will be discussed further in Chapter 5.

Snyman has argued that a court would be able to make use of a “general, nontechnical meaning” of the concept of a criminal gang.<sup>616</sup> This would include the broader (non-legal) definitions as described above.<sup>617</sup> Kruger however is not so willing to accept this interpretation. The author argues that there will have to be “clear evidence” that a criminal gang is devoid of the very detailed indicia provided for in the definition.<sup>618</sup> It is submitted that Snyman’s interpretation appears to be more in line with what is expected of a definition that incorporates the word “includes” at the beginning of the definition. This is also more in line with the general legislative intent of POCA as confirmed in case law.<sup>619</sup> The SCA has also held that this legislative intent

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<sup>614</sup> See 1 3 1 above especially.

<sup>615</sup> Own emphasis.

<sup>616</sup> CR Snyman “Die nuwe statutêre misdaad van deelname aan 'n kriminele bende” (1999) 12 *South African Journal of Criminal Justice* 213 215.

<sup>617</sup> See 1 3 1 above.

<sup>618</sup> A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) 72.

<sup>619</sup> See *Mohunram* para 144; *Mohamed* para 14 and discussion at 4 2 above.



calls for a *liberal* interpretation of the various Chapters in POCA.<sup>620</sup> It is however submitted that Kruger's interpretation is the *preferred* interpretation because it avoids conflict with the principle of legality and should thus be followed by courts.<sup>621</sup>

It must furthermore be read in conjunction with section 11 ("Interpretation of a criminal gang") which lists several factors which a court may consider in deciding whether someone is a member of a criminal gang. These factors are, when an accused

- (a) admits to criminal gang membership;
- (b) is identified as a member of a criminal gang by a parent or guardian;
- (c) resides in or frequents a particular criminal gang's area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known members of a criminal gang;
- (d) has been arrested more than once in the company of identified members of a criminal gang for offences which are consistent with usual criminal gang activities;
- (e) is identified as a member of a criminal gang by physical evidence such as photographs or other documentation.

Here, just like in STEP, there is no exact definition for a criminal gang. The Court in *Thomas* did not explicitly rely on section 11 in determining gang membership but did consider aspects relating to the individual style of dress, tattoos and language as supporting a finding of gang membership.<sup>622</sup>

In terms of STEP, a "criminal street gang"

(...) *means* any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common

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<sup>620</sup> *Prinsloo* para 57. The SCA held that this liberal construction especially applies to sections 2(1)(e)-(f).

<sup>621</sup> See 5 3 2 2 below. Kruger's interpretation would therefore avoid legality issues but amendment to the text is recommended to bolster this approach. See 7 2 below for suggested amendments to the text of POCA.

<sup>622</sup> These factors are specifically listed in section 11(c). See *Thomas* 481-482 especially. *Ceaser* at 16 where there is brief testimony of the tattoos of the Americans gang. See further discussion at 4 5 1 1 3 below.

identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>623</sup>

It is notable that the Californian Legislature opted for a peremptory definition instead of the directory definition of the South African legislature. Except for that, the definition is almost identical to the definition of a criminal gang under POCA. Therefore, it is submitted that there must have been a conscious legislative reason for changing the wording followed under STEP and not just due to “careless drafting”.<sup>624</sup>

Californian courts have interpreted three core requirements for proving the legal existence of a criminal street gang. The group must, firstly, be an ongoing association consisting at least of three persons. That association must furthermore have an identifying symbol or name. Then, secondly, the group must have as one of their main activities the commission of one or more of the listed (predicate) offences. The members of the group, finally, must have engaged in a pattern of criminal gang activity – either in the past or presently.<sup>625</sup>

STEP also excludes certain predicate offences from consideration for purposes of establishing that one of its primary activities is the commission of the listed offences. The offences that are explicitly excluded mostly relates to theft<sup>626</sup> or fraudulent use<sup>627</sup> involving bank cards or account information.

Trade unions are explicitly excluded under STEP<sup>628</sup> but not POCA. The reason for this difference is unknown. Trade unions in South Africa have been known to engage in violent activities.<sup>629</sup> The most prominent example in recent history is undoubtedly

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<sup>623</sup> §186.22(f) of STEP (own emphasis).

<sup>624</sup> Kruger *Organised Crime* 72. Here, the author indicates that there might have been some carelessness in the drafting of POCA. See 5 3 1 3 3 below for a more comprehensive discussion on the issue of careless drafting *casus omissus*.

<sup>625</sup> *People v. Lara* 9 Cal.App.5th 296 (2017) at 332; *People v. Sengpadychith* 27 P.3d 739 (2001) at 744; *People v. Loeun* P.2d 1313 (1997) at 1316.

<sup>626</sup> Paragraph (26) of STEP read with Section 484e of the Californian Criminal Code.

<sup>627</sup> Paragraph (27) of STEP 484g of the Californian Criminal Code.

<sup>628</sup> In terms of § 186(23), which states that

[t]his chapter does not apply to employees engaged in concerted activities for their mutual aid and protection, or the activities of labor organizations or their members or agents.

<sup>629</sup> See generally M Tenza “An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions” (2015) 19 *Law, Democracy and Development* 211.

the tragedy at the Marikana Mines following an unprotected strike.<sup>630</sup> Although striking workers might not fall under the traditional conception of a “criminal gang”, they may satisfy the definitional requirements of a gang (either in terms of the statutory text or in terms of the ordinary meaning of the word) and thus fall within the ambit of POCA. Any trade union consists of three or more persons; is an ongoing formal organisation; more often than not have an identifiable name or symbol. If a series of offences were committed during an industrial action, the trade union will have satisfied the requirement of having one of its activities the commission of one or more criminal offences. This goes hand-in-hand with the members having individually or collectively engaging in a pattern of criminal gang activity. It is suggested that a similar provision to section 186(23) be included in POCA to avoid a scenario where persons involved in industrial action be charged for gang-related offences. Such a prosecutorial decision would cause significant societal outcry – just as when the Marikana workers were charged under the common purpose doctrine.<sup>631</sup> At any rate, the criminalisation of industrial action and trade union activities via an overzealous prosecutorial interpretation and application of POCA would undoubtedly fall outside the legislative intent.

#### **4 5 1 1 1      *Formal or informal ongoing association or group of three or more persons***

The gang must consist out of some sort of structure and the Legislature, over and above opting to give a directory definition, defines this part of the definition extremely liberally. This structure may firstly be an association of persons of either a formal or informal nature. This means that the association or group may have some kind of legitimate structure (or guise) such as a club or business. It equally denotes that the structure may be of an informal nature where such a structure is absent. The qualifier to both these terms is that the structure be *ongoing*. This word will necessarily exclude structures that have formed spontaneously and such structures would fall more within the ambit of the common purpose doctrine in its active association form.<sup>632</sup> The structure may furthermore consist of three or more persons and this should not be a

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<sup>630</sup> See 3 3 2 above for a brief overview of the incident.

<sup>631</sup> See 3 3 2.

<sup>632</sup> See 3 3 3.

problematic requirement for the State to prove. Smaller (emerging) gangs constitute relatively small numbers. In other instances, gangs may constitute supergangs as described above. This can also be contrasted to niche gangs that develop to cater to a certain market or only operate in a small geographical area and may form and come to an end rather sporadically.<sup>633</sup> Gang sizes vary and may range from ten members with smaller gangs to between (an estimated) 5 000 and 10 000 members for supergangs such as the “Americans”.<sup>634</sup>

A strict and peremptory definition is preferred especially in instances where it has to be determined whether someone was a member of a criminal gang. Many persons may form part of the gang sphere including established and “hard-core” members as well as members on the fringe of the gang who merely admire the actual members or who aspire to join the gang.<sup>635</sup> The latter group should not fall within the ambit of this definition.

The problematic aspect of this part of the definition may be the requirement that the structure be of an ongoing nature. As pointed out above, gangs, especially smaller gangs, may form and die out sporadically. Such gangs should not be considered as “ongoing” and not fall within the ambit of POCA. It is suggested that this part of the definition is aimed at specially excluding groups that have formed sporadically at the scene of a crime or for the execution of a specific crime. This would constitute a factual matrix that would fall under the scope of the common purpose doctrine.

#### **4 5 1 1 2      *One of its activities is the commission of criminal offences***

This phrase indicates that the criminal gang may have other activities other than their illicit activities – as long as it is a “main” activity. This also means that criminal gangs may use legitimate organisations as guises for their criminal gang activities.

POCA does not require that these main activities be one of the listed activities in Schedule 1. It merely requires there to be the commission of criminal offences. This is

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<sup>633</sup> Standing *Cape Flats* 103.

<sup>634</sup> Standing *Cape Flats* 104. Pinnock estimates the combined membership of the Americans and Hard Livings to have been between 3 000 and 10 000 in 1994 – see Pinnock *Gang Town* 97.

<sup>635</sup> See Standing *Cape Flats* (2005) 104.

in contrast with STEP,<sup>636</sup> which requires that the “primary activities”<sup>637</sup> be one of the enumerated criminal acts.

Californian courts were previously inconsistent with their interpretation of this part of the definition.<sup>638</sup> While some courts indicated that the current offences before the court were sufficient to prove the “primary activities” requirement,<sup>639</sup> others indicated that crimes other than the ones the accused was currently charged with were required.<sup>640</sup> In other words, the debate was whether a “primary activity” could be discerned by merely looking at the single incidences before the court or whether a more holistic or historical view had to be taken. Witkin indicates that this issue was resolved in *People v. Sengpadychith* (“*Sengpadychith*”).<sup>641</sup> Here the Supreme Court of California held that both past and present activities were acceptable in determining an alleged gang’s primary activity as both categories “have some tendency in reason to show the group’s primary activity” and therefore also falls within the scope of the general rules of admissibility.<sup>642</sup> The Court further postulates that this would necessarily exclude *occasional* commission of the relevant crimes – such as a police department or environmental organisation committing the listed crimes.<sup>643</sup> The commission of the listed crimes, in such instances, would not be the *primary* activity of the organisation.

This part of the definition may prove problematic when exercising otherwise constitutionally protected activities, especially the right to protest<sup>644</sup> and strike.<sup>645</sup> Certain factions of the *#FeesMustFall* movement serve as example. Some protests by this movement have become extremely violent and do in fact satisfy the elements of

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<sup>636</sup> In terms of §186.22(f).

<sup>637</sup> STEP uses the term “primary activities” in contrast to POCA which uses main activities. These terms are semantically identical.

<sup>638</sup> See BE Witkin, NL Epstein & members of the Witkin Legal Institute *Witkin California Criminal Law* 4 ed vol 7 (2012) para 33; *People v. Sengpadychith* 27 P.3d 739 (2001) at 856.

<sup>639</sup> See *People v. Galvan* 68 C.A.4th 1135 (1998).

<sup>640</sup> See *In re Elodio O.* 56 C.A.4th 1175 (1997).

<sup>641</sup> See fn 637 above.

<sup>642</sup> *Sengpadychith* at 857.

<sup>643</sup> *Sengpadychith* at 857 referring to *People v. Gardeley* 14 Cal. 4th 605 (1996) (“*Gardeley*”).

<sup>644</sup> In terms of section 17 of the Constitution.

<sup>645</sup> In terms of section 23(2)(c) of the Constitution.

the definition of criminal gang in terms of section 1.<sup>646</sup> As illustrated with trade unions above, *#FeesMustFall* is an ongoing formal (or informal) association of three or more persons with an identifiable name. One of the activities in which certain of its members participated, was the commission of one or more activities listed in Schedule 1 of POCA – in which members individually or collectively engaged. It is argued here that although *#FeesMustFall* is not a criminal gang in the strict sense, members of this organisation or similar bodies may fall under the broad wording of the Act. There is further no doubt that their activities would qualify if a court were to consider the definition under section 1 as directory. Again, prosecutorial abuse of POCA to suppress otherwise democratic practices of concerned or even angry citizens would arguably fall foul of the legislative intent of POCA, not to mention the ethos of the Constitution which certainly envisages an open and free society with a robust democratic culture. The point here is merely that the structure and wording of POCA Chapter 4 is such that movements, sometimes engaging in criminal activities (or associated with criminal activities) could potentially fall under the rubric of POCA Chapter 4.

#### **4 5 1 1 3      *Identifiable name or symbol***

The definition requires that the gang have an identifiable name or symbol. The function of this requirement is potentially to differentiate criminal gangs from non-ongoing associations that may have participated in illegal activities but do not constitute a gang or persons who are fringe members that are neither active participants nor members. As mentioned above, POCA aims to only punish ongoing structures.

Section 11 of POCA, provides guiding factors a court may take into consideration in determining whether an accused is a member of a criminal gang. Section 11(c) specifically mentions clothing style; the use of hand signs; language and tattoos as

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<sup>646</sup> See for example *Hotz and Others v University of Cape Town* 2017 (7) BCLR 815 (CC) para 1; *Concerned Association of Parents and Others for Tertiary Education at Universities v Nelson Mandela Metropolitan University and Another* ECC 10-11-2016 case no. 4976/2016; J Duncan “Opinion: Why Student Protests in SA Have Turned Violent (30-09-2016) EWN <<http://ewn.co.za/2016/09/30/OPINION-Why-student-protests-in-South-Africa-have-turned-violent>> (accessed 01-12-2017). Chapter 5 of this dissertation will investigate whether Chapter 4 of POCA in fact infringes on associational freedoms in the broad sense.

factors that may indicate that someone is a member of a criminal gang. Gangs typically have their own and distinct fashion, colours, tattoos and slang (or “sabela” as used by the 28s gang).<sup>647</sup> This is both to show kinship, facilitate intra-gang cohesion as well as an expression of their dissent from the mainstream from which they often have been ostracised from.<sup>648</sup> Wijnberg points out how the Americans gang, for example, has appropriated symbols of American culture and government to symbolise the gang. The American way of life appeals to them because of pop culture depictions of the country as one of lavish lifestyles they aspire to.<sup>649</sup> Members of the 28s gang are associated with various insignia, such as tattoos of the number 28, a setting sun, and thumb, index finger and middle finger tattooed with the Afrikaans word “Sonaf” (sunset).<sup>650</sup> Membership is often confirmed upon the receipt of such a tattoo.<sup>651</sup> Their *sabela* slang is used to communicate covertly with fellow gang members about criminal operations as well as their wellbeing in general.<sup>652</sup>

These factors however do not constitute presumptions with regards to gang membership, which would constitute a violation of an accused’s presumption of innocence.<sup>653</sup> The Organised Crime Bill provided for a statutory presumption that someone was a gang member if two or more of the listed factors in section 1(iv)<sup>654</sup>

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<sup>647</sup> See Wijnberg *Exploration* (2012) 30. *Sabela* is an amalgamation of English, Afrikaans and Zulu and refers to gang language in general. Also see *Thomas* at 482 where a witness refers to gang members kneeling before and addressing the gang leader (accused number 1) in this language while in prison; suggesting an authoritative relationship over these members. The 26s and 27s speak *shalombom* while the 28s speak *ndyaza* – see Pinnock *Gang Town* 101.

<sup>648</sup> See Wijnberg *Exploration* (2012) 30; Standing (2010) *African Security Review* 105.

<sup>649</sup> See Wijnberg *Exploration* (2012) 30.

<sup>650</sup> See *Thomas* at 481 where the Court considered this information, together with other factors, to determine the role of the main accused in the 28s gang.

<sup>651</sup> See D Pinnock *Gang Town* 83; 89.

<sup>652</sup> *Thomas* 179-180.

<sup>653</sup> In terms of section 35(3)(h) of the Constitution. Also see Snyman (1999) *South African Journal of Criminal Justice* 216-217.

<sup>654</sup> “criminal gang member” is a person who is a member of a criminal gang and in considering whether a person is a member of a gang the court may, when applicable, take into account two or more of the following factors, namely that such person—

- (a) admits to criminal gang membership;
- (b) is identified as a criminal gang member by a parent or guardian;
- (c) is identified as a criminal gang member by a documented reliable informant;



were present. This provision possibly infringed the freedom of association<sup>655</sup> but was subsequently omitted from the final text of POCA. The sole discretion in determining whether someone is a gang member is now up to the court in terms of section 11 of POCA. The contents of section 11 are merely factors. This may prove to be more problematic than the position under the Organised Crime Bill because there is no definition of a gang member in POCA (despite the word being used several times throughout the statute) which may constitute an infringement of the *ius certum* rule.

It may be questioned whether it is imperative for a criminal gang to have an identifiable name and symbol. Gangs may even develop in order to circumvent this requirement and no longer brand their members with such names and symbols.<sup>656</sup> It is also quite possible for members of the community to assimilate the gang lifestyle – purely out of admiration or to not fall victim of gang attacks.<sup>657</sup> Fringe members trying to impress gang leaders may then fall under the scope of POCA when they are not in actual fact gang members but “merely” active participants.

The definition of “criminal street gang” also requires the existence of a “common name or common identifying sign or symbol”.<sup>658</sup> STEP case law indicates that when a gang is known by two names (for instance “Tongan Family” or simply “the Family”), the existence and use of at least one of these names by the members will satisfy this requirement.<sup>659</sup>

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(d) resides in or frequents a particular criminal gang’s area and adopts their style of dress, their use of hand signs, language or their tattoos, and associates with known criminal gang members;

(e) is identified as a criminal gang member by an informant of previously untested reliability and such identification is corroborated by independent information;

(f) has been arrested more than once in the company of identified criminal gang members for offences which are consistent with usual criminal gang activity;”

(g) is identified as a criminal gang member by physical evidence such as photographs or other documentation [.]

<sup>655</sup> In terms of section 18 of the Constitution. Also see Cowling (1998) *South African Journal of Criminal Justice* 372.

<sup>656</sup> See Burchell *Principles* 910.

<sup>657</sup> Pinnock *Gang Town* 92.

<sup>658</sup> §186.22(f) of STEP.

<sup>659</sup> *In re Nathaniel C.* 228 Cal.App.3d 990 (1991) at 1001.

#### **4 5 1 1 4    *Members individually or collectively engage in a pattern of criminal gang activity***

This element makes it possible for only certain members at a time to engage in a pattern of criminal gang activities and not necessarily the *entire* gang at once. Although members can *individually* contribute to the pattern, it does not mean that the other members are automatically liable for an offence. An accused would have to, in his or her own capacity, commit an offence in terms of section 9 of POCA.

The State may rely on the predicate acts of any of the members of the criminal gang to establish the requisite pattern.<sup>660</sup> It is somewhat more contentious when the State wants to rely on the accused party's *own* previous convictions. This is due to the fact that proof of an accused's previous convictions is considered as similar fact evidence and excluded on the basis that it is irrelevant or immaterial. The equivalent provision in Chapter 2 of POCA has already been (unsuccessfully) constitutionally challenged in *Savoi I* and *II*. A comprehensive discussion of this aspect of the POCA will ensue in Chapter 5 of this dissertation.

It is uncertain why there is a difference between the Chapter 2 and 4 in this regard. Chapter 2 requires *personal* commission of the requisite predicate acts. This is not the case under Chapter 4 as members may personally or *collectively* engage in the pattern to constitute such a pattern. This harks back, once again, to the common purpose doctrine where personal guilt (in the full sense) is not required to secure a conviction and guilt by association (or more specifically imputation) would suffice.

#### **4 5 1 1 5    *Active participation or gang membership***

This requirement only appears later in section 9(1)(a)-(c) but will be discussed here for purposes of convenience. An accused may only be criminally liable in terms of these subsections when he or she is a gang member or is an active participant in a gang.

POCA, just like its Californian counterpart, STEP, does not contain a definition of the term or concept "gang membership". The closest is section 11 which provides courts with factors to assist in the interpretation of a criminal gang.

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<sup>660</sup> This is also the situation under STEP. See for example *Gardeley* 624-625.

There are certain requirements that have to be satisfied for a gang member to be considered an active participant under STEP. A court must be satisfied that an accused was more than a nominal member of the gang.<sup>661</sup> The accused must, secondly, have knowledge of the gang's present or past participation in a pattern of criminal gang activity. The accused must then finally have had the requisite intent by furthering, promoting or assisting in the felonious conduct of the gang.<sup>662</sup>

The interpretation of the concepts of membership and active participation have proven to be a contentious matter in STEP case law and has been subjected to several constitutional challenges.<sup>663</sup> The authoritative position, for almost a decade, under *People v. Green* ("Green"),<sup>664</sup> was that "member" or "membership" required a criminal association that was not merely superficial and thus "(...) not accidental, artificial or unconsciously in appearance only".<sup>665</sup> It was also found that the terms membership and "active participation" had the same meaning and that the latter required conduct that was not merely "nominal, passive, inactive or purely technical" and that the defendant must devote all or a substantial part of his or her time to the gang's activities.<sup>666</sup> The Californian Legislature was however not in favour of this interpretation and inserted a subsection overruling this interpretation.<sup>667</sup> The California Supreme Court then subsequently also held that active participation required conduct that is "more than nominal or passive" and thus creating a wider criminal net as per *Green*.<sup>668</sup>

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<sup>661</sup> *People v. Castenada* 23 Cal.4th 743 (2000); *People v. Lamas* 42 Cal. 4th 516 (2007) at 524.

<sup>662</sup> *Lamas* at 524.

<sup>663</sup> See Chapter 5 below for a discussion on the constitutional challenges.

<sup>664</sup> 278 Cal.Rptr. 140 (1991).

<sup>665</sup> *Green* 145.

<sup>666</sup> *Green* 146.

<sup>667</sup> Section 186.22(i) states that:

In order to secure a conviction or sustain a juvenile petition, pursuant to subdivision (a) it is not necessary for the prosecution to prove that the person devotes all, or a substantial part, of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

Also see A Schloenhardt *Palermo on the Pacific Rim: Organised Crime Offences in The Asia Pacific Region* (2009) 256.

<sup>668</sup> *Castenada* 745-753.

It is alarming that these decisions and legislative history were available to the legislature during the drafting of POCA, yet no attempt was made to insert a similar or equivalent provision as the Californian legislature or merely define this concept in any form.

What is required under the POCA scheme, is that *the gang* (either by individual members or collectively) commit more than one offence to give rise to the pattern.<sup>669</sup> This appears to be an imputation of conduct which is, once again, reminiscent of the common purpose doctrine.

#### **4 5 1 2      A “pattern of criminal gang activity”**

A pattern of criminal gang activity

*includes* the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed

(a) on separate occasions;

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<sup>669</sup> See *S v Eyssen* (unreported case, no CC31/06, CPD) (“*Eyssen I*”). Veldhuizen J found that it will suffice for the State to show that (...) two or more criminal offences have been committed by the gang no matter that any one member may only have committed one crime.” Kruger submits that it is not necessary for State to prove that the accused had committed two or more predicate acts due to the directory wording of the definition – see Kruger *Organised Crime* (2013) 72. This statement is contentious. It must firstly be agreed that definition is directory in nature. The issue is not necessarily whether an *individual accused* has committed these predicate offences but whether the *criminal gang* (as a whole) has. Burchell states that Kruger “missed the point” with the interpretation of this part of the statute – see JM Burchell “Organised crime and proceeds of crime law in South Africa” (2010) 23 *South African Journal of Criminal Justice* 177 179. The former author also points out that the commission of a single offence (in the absence of other offences by either an individual gang member or the criminal gang as a whole) would be contradictory to the word “pattern”. Burchell’s comments are in relation to Kruger’s first edition of this publication (A Kruger *Organised crime and Proceeds of Crime Law in South Africa* (2008)). In the original version Kruger relied on the *Eyssen I* judgement as authority for his interpretation (at 56). In the second edition, however, there is no reference to *Eyssen I* as authority for this view but merely reference to the directory nature. Kruger’s original interpretation might have been based on a slight misreading of the judgement but is not incorrect. A strict adherence to the directory nature will indeed lend itself to absurdities such as not requiring more than one predicate act to constitute the requisite pattern. It is however unfathomable that court would come to such a conclusion.

(b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang [...]<sup>670</sup>

This definition in section 1 once again utilises the word “includes” at the beginning of the definition, indicating a definition of a directory nature. Binns-Ward J in *S v Jordaan and Others* WCC 16-11-2017 case no CC20/2017 (“*Jordaan*”) admitted to being uncertain about the application of this definition (both as a definition and further use of the term in the text of section 9(2)(a)) and whether courts were to follow the comprehensive statutory definition or “whether it also bore the meaning denoted by the words making it up used in their ordinary sense.”<sup>671</sup> The learned judge however did not make a pronouncement on this issue but does seem to accept a “pattern of criminal gang activity” in the ordinary sense of the word as a legitimate option.<sup>672</sup>

Circumventing some of the essential elements in this definition (due to the directory nature) will however lead to some absurdities. Satisfying the pattern requirement with only one criminal act, for example, would “defy the ordinary meaning of the word ‘pattern’”.<sup>673</sup> The SCA in *S v Eyssen II* also affirmed this by referring to the inherent plural and repetitive nature of the term “pattern”.<sup>674</sup>

POCA creates several deviations from the traditional rules of the law of evidence and will also be discussed in detail below in Chapter 5. Two distinct technical or procedural issues were raised in *S v de Vries and Others* (“*de Vries*”)<sup>675</sup> in relation to the racketeering offences in terms of Chapter 2 of POCA. Section 2(2), specifically, enables the State to adduce evidence that would have been otherwise inadmissible, on the condition that that evidence does not render the trial unfair. The appellant contented by hearing the substantive offences in Chapter 2 in conjunction with the underlying predicate offences, on the same charge sheet, renders an accused’s trial unfair. The SCA considered this to be an academic enquiry due to the appellant’s legal team not putting a substantive argument forward as to exactly how, in that specific case, it rendered the trial unfair. Leach JA held that this conceptual separation occurs

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<sup>670</sup> Own emphasis.

<sup>671</sup> *Jordaan* para 136. The learned judge also referred to a prior judgement of his (*S v Peters and Another* WCC 04-11-2013 case no SS17/2013) discussing this particular point.

<sup>672</sup> See *Jordaan* para 136 and 4 5 2 4 below

<sup>673</sup> Burchell (2010) *South African Journal of Criminal Justice* 179.

<sup>674</sup> See *Eyssen II* paras 8-9.

<sup>675</sup> 2012 (1) SCR 186 (SCA).

daily and suggested that “trained judicial mind[s]” are sufficiently equipped to deal with such problems not only in the current type of scenario but similar instances (such as trials-within-trials) as well.<sup>676</sup>

Leach JA similarly rejected the argument that racketeering offences under POCA constituted an improper splitting of charges and/or duplication of convictions. It was further held that these provisions do not give rise to the pleas of either *autrefois acquit* or *autrefois convict*.

The plea<sup>677</sup> of *autrefois acquit* in South African law can be raised when a competent court has previously acquitted an accused of the same crime of which he is currently charged.<sup>678</sup> Similarly, the plea<sup>679</sup> of *autrefois convict* may be raised when an accused has already been convicted of the current charge.<sup>680</sup> These pleadings have also been enshrined in the Constitution.<sup>681</sup> The duplication of convictions occurs when multiple punishments are imposed on an accused for the same criminal conduct.<sup>682</sup> It was

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<sup>676</sup> See *Eyssen II* paras 50-53.

<sup>677</sup> In terms of section 106(1)(d) of the Criminal Procedure Act.

<sup>678</sup> JP Swanepoel “Arraignment and plea of an accused” in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 271 299-306. Also see A Kruger *Hiemstra’s Criminal Procedure* (2016) 15-13.

<sup>679</sup> In terms of section 106(1)(c) of the Criminal Procedure Act.

<sup>680</sup> Joubert et al *Handbook* 299-306.

<sup>681</sup> In terms of section 35(3)(m).

<sup>682</sup> See *de Vries* para 44. The SCA dealt with this matter again in *Prinsloo*. For purposes of this discussion, emphasis shall only be placed on the question whether convicting Accused 1 in *Prinsloo* on both sections 2(1)(e) and 2(1)(f) of POCA constituted a duplication of convictions (see paras 55-60 and Brand JA’s separate dissenting judgement at paras 395-399). The majority judgement by Fourie and Eksteen AJJA does not analyse whether this constitutes a duplication of conviction (or splitting of charges) but rather addresses the contention by Accused 1 that someone who participates in a racketeering scheme (section 2(1)(e)) cannot also be held liable as managing said scheme (section 2(1)(f)). The majority found that this is in fact possible and refers to its previous judgement in *de Vries* (although the Court incorrectly refers to the *a quo* judgement in *S v de Vries and Others* case no 67/2005 (20 April 2006)) and states that a liberal construction of POCA should be followed, especially in reference to the vexed subsections. This would then also be in line with the intention of the Legislature to curb organised crime. A finding to the contrary, it was submitted, would lead to absurdities. Brand JA, on the other hand, found that this was an improper duplication of convictions. The learned judge relies on the dictum in *R v Van der Merwe* 1921 TPD 1, where it was held that

consequently held, based on RICO jurisprudence<sup>683</sup> that the so-called “umbrella” or POCA offence constitutes a separate and distinct crime from the underlying predicate offence and that neither of the three pleas or defences cannot be raised to shield an accused from prosecution.<sup>684</sup> Relying on the Court’s previous judgment in *S v Dos Santos and Another* (“*Dos Santos*”),<sup>685</sup> the SCA acknowledged that there will often be an overlap in evidence in POCA cases but this does not result in a duplication of convictions or splitting of charges.<sup>686</sup>

This issue was also disposed with by Californian courts, based on alleged violations of the rule against double jeopardy. Courts have found that underlying predicate crimes had “a separate intent and objective”<sup>687</sup> and, with reference to *mens rea*, that an accused has “two independent, even if simultaneous, objectives”.<sup>688</sup>

The Court in *Thomas* dealt with the pattern requirement in a pragmatic fashion. The State submitted that several of the accused (including Accused 1 to 12, 15, 17 and 19) formed part of the 28s gang. There were no submissions, save perhaps in relation to Accused 1, that they were members or active participants of that gang. The charges against these accused were listed and it was further submitted that those charges

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(...) if the evidence necessary to prove one criminal act *necessarily* involves evidence of another criminal act, those two are to be considered as one transaction. *But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes* [Brand JA’s emphasis].

He acknowledges that there might be certain instances (such as the scenario described by the majority at para 59) where the manager participated in certain activities of the enterprise but in others not – where he or she only had knowledge of said activities. Duplication of convictions however take place where “(...) the knowledge proved for purposes of (f) derives from the very participation which founded the conviction in (e)” (para 399). This is a convincing argument. See generally M Basdeo, MG Karels & JP Swanepoel “Indictments and charge sheets” in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 237 249-254.

<sup>683</sup> Mainly *United States v Crosby* 305 U.S.App.D.C. 290 (1994). There the Court looked at the legislative intent behind RICO and that the legislature promulgated it to create new laws – thus distinct from the existing laws – rendering an argument based on double jeopardy (based on the Fifth Amendment of the US Constitution) invalid.

<sup>684</sup> See *de Vries* especially paras 44-48.

<sup>685</sup> 2010 (2) SACR 382 (SCA).

<sup>686</sup> *Dos Santos* para 43.

<sup>687</sup> *In re Jose P.* 106 Cal.App.4th 458 (2003) at 471. Also see 5 3 1 4 1 below.

<sup>688</sup> *People v. Herrera* 70 Cal.App.4th 1456 (1999) at 1466. Also see 5 3 1 4 1 below.



(specifically charges 6 to 167) constituted the requisite pattern of criminal gang activity.<sup>689</sup> The Court never pertinently analysed whether the offences constituted a pattern as required in the definition in section 1 of POCA. Constituting a pattern was however not problematic. The number of charged offences was so vast, it easily constituted the requisite pattern.<sup>690</sup> The problem lies with the approach by the court. Another court could interpret this approach to mean that the mere presence of a large number of charged offences would *ipso facto* constitute a pattern of criminal gang activity when those offences do not qualify as such under either subsections (a) or (b). In *S v Ceaser* WCC 29-11-2010 case no SS29/2009 (“*Ceaser*”) six out of the seven accused were charged with a myriad of crimes including a contravention of subsections 9(1)(a) and (b) of POCA. The Court held that there was a “strong suspicion” that the activities of the relevant accused were gang-related, but, without providing reasons why, the State’s evidence failed to prove so beyond a reasonable doubt.<sup>691</sup> All six of the relevant accused were consequently held to not be guilty of subsections (a) and (b). In *Jordaan*, the Court held that the State successfully adduced the requisite pattern (as pointed out above) either in terms of the definition or in a nontechnical sense.<sup>692</sup> This at least indicates the Court’s cognizance of the definition as an essential element to the structure of POCA.

Nothing prohibits a court from using the common purpose doctrine to establish the pattern. Where there is insufficient evidence to establish that the conduct of the particular individual accused has made out a pattern, his participation in a joint criminal

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<sup>689</sup> *Thomas* 14.

<sup>690</sup> This in seems to have been the approach by the SCA in *Prinsloo* as well. Fourie and Eksteen AJJA at para 48 held that

[t]he first accused also did not seriously dispute the finding of the court a quo that a ‘pattern of racketeering activities’ as defined in s 1 of POCA, had taken place in conducting the business of the scheme. As will become clear in due course, *a multitude of offences referred to in Schedule 1 of POCA had been committed by the accused* in conducting the scheme through its various entities, which offences had occurred prior to and after the commencement of POCA and within a ten year period as prescribed by POCA [own emphasis].

The SCA however did endeavour somewhat more than the WCC in *Thomas* in discussing the elements of the pattern requirement by referencing the ten-year period and the commencement date of POCA.

<sup>691</sup> *Ceaser* at 56.

<sup>692</sup> *Jordaan* para 136.

scheme may be utilised. The court in *S v Miller and Others* WCC 04-09-2017 case no SS13/2012 (“*Miller*”) confirmed this as a possibility in relation to racketeering activity under Chapter 2 of POCA. The Court emphasised the importance of *first* establishing the existence of a predicate offence before a finding is made on the substantive offences under section 2. Gamble J was alert of this and firstly remarks the following:

However, we had difficulty in concluding that [Van Rensburg] can be said to have committed two predicate offences and we requested the State to address us on the point. Ms Heeramun, in reply, fairly conceded that the State could not point directly thereto, but she went on to argue that Van Rensburg's criminal liability can be inferred through the application of the doctrine of common purpose.<sup>693</sup>

And in conclusion:

In my view there can be no principal [sic] objection to applying the doctrine of common purpose to establish liability under a predicate offence. One need only think of the type of gang-related activities which are routinely prosecuted under POCA, for example, murder, rape and robbery, in which it could hardly be claimed that the doctrine of common purpose could not be used to establish the liability of an individual gang member in relation to crimes committed by the collective. The offences to which I have just referred are, of course, consequence crimes, but as I have already said there can be no objection to apply the doctrine to statutory crimes, committed by such a collective. The court must simply be cautious that it does not circumvent proof of the predicate offences and, if it relies on common purpose to do so, that all the elements of the doctrine are found to exist.<sup>694</sup>

Three points must be noted here. The common purpose doctrine can, firstly, be used in conjunction with POCA as an anti-gang measure, as illustrated in Chapter 3 above,<sup>695</sup> and secondly that it may be used in order to prove the requisite pattern as described in *Miller*. Courts must, thirdly, take care in *establishing* the pattern and not be blinded by the volume of (presumed) offences or impression of criminality.

The elements of the definition of a pattern of criminal gang activity will be discussed below.

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<sup>693</sup> *Miller* para 284.

<sup>694</sup> *Miller* para 290.

<sup>695</sup> See 3 3 5 above (Interaction between POCA and the common purpose doctrine).

#### **4 5 1 2 1      *The commission of two or more offences in Schedule 1***

Schedule 1 lists no less than 37 offences. This list forms the list of so-called predicate offences that an accused must commit to form the required pattern of criminal gang activity. At least two offences must have been committed to form the requisite pattern. If a court had to follow a directory interpretation of this definition, then this requirement may be ignored and would lead to absurdities and an unconstitutional approach.<sup>696</sup>

Although this appears to be a closed list of offences, the mere scope of the conduct listed would cover, it is submitted, the most common criminal offences by criminal gangs and that it would be hard for conduct *not* to fall within that ambit. Item 33 also includes offences with the punishment not exceeding one year imprisonment without the option of a fine and Item 34 includes the incitement, attempt or conspiracy to commit any of the other offences listed in the Schedule.

#### **4 5 1 2 2      *Offences committed prior and/or after the commencement of Chapter 4 and within three years of each other***

POCA requires at least one of the predicate offences to have been committed after its commencement date – which was the 21<sup>st</sup> of January 1999. The similar wording of Chapter 2 of the Act was subject to constitutional challenge in *Savoi I* and *Savoi II* because of alleged retrospective (or *ex post facto*) functioning.<sup>697</sup> This is due to the acts prior to the operation of POCA becoming an element to a new crime after the commencement date of POCA. The Constitutional Court in *Savoi II* found that this did not constitute retrospective punishment and that POCA still provided sufficient forewarning to citizens in order for them to adjust their conduct and avoid punishment. A comprehensive review of this aspect of the judgment will follow in Chapter 5 below.

#### **4 5 1 2 3      *Offences committed on separate occasions or on the same occasion***

The Act provides for two different scenarios. The acts constituting a pattern of criminal gang activity, per subsection (a), may firstly be perpetrated on separate occasions. The second scenario is where the acts occur on the same occasion (in

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<sup>696</sup> See Chapter 5 3 2 2 below.

<sup>697</sup> See Chapter 5 3 1 3 3 especially for a comprehensive discussion on the constitutional challenge.

other words, several criminal acts may be perpetrated during one criminal endeavour). The second scenario has the added *proviso* that during that same occasion, the acts be perpetrated by two or more persons who are members of or “belong”<sup>698</sup> to the same criminal gang.

Subsection (b) is reminiscent of the common purpose doctrine. Where criminal acts are committed by two or more persons during the same criminal endeavour, all those acts committed during that criminal endeavour will qualify as predicate crimes, provided that the parties to the criminal endeavour are members of or belong to the same criminal gang. There would thus be a *de facto* imputation of liability to satisfy the pattern requirement. The following scenario serves as an example. A and B walk down the street. C and D (who are both members of the Cool Cats gang) decide to rob them. C robs A of her cellphone and D assaults B (who is trying to protect A). Both C’s and D’s crimes could be used as predicate crimes to form the requisite pattern. For purposes of a prosecution under Chapter 4 of POCA, it will be as if A and B both committed robbery and assault. This is however not the situation under the comparable racketeering offence because that definition requires the predicate crimes to be “planned, ongoing, continuous or repeated participation or involvement” and not merely a single, sporadic instance.<sup>699</sup> The broader wording with respect to the gang-related offences casts a potentially much wider net of criminalisation.

It is unfortunately not clear what subsection (a) specifically requires. POCA simply states that the acts may be committed on separate occasions. There is no indication as to whether it can be effectuated by one person on separate occasions or may (or even must) also be done by multiple gang members on separate occasions. Uncertainty also exists whether individual parties contributing to the pattern on separate occasions must be of the same gang. Could a single member (Mr A) of the 26 gang contribute to a pattern of criminal gang activity of the 28 gang and could Mr A’s offences then be used against members of the 28s? The Court in *Thomas* accepted that Accused 16 contributed to the criminal enterprise of the 28s gang despite him being a member of different gang, the 26s, and he was convicted under

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<sup>698</sup> POCA never defines the term “belong” anywhere in the Act. In fact, it is never used again. This may be another example of “careless drafting” but it nonetheless frustrates a meaningful interpretation of the text of the Act.

<sup>699</sup> See Kruger *Organised Crime* 25. Also see *Thomas* at 460. In *Eyssen II* at paras 8-9 the SCA emphasised the repeated nature required to form the pattern.

Chapter 2 of POCA.<sup>700</sup> The gang membership of Accused 16 was not mentioned in the context of Chapter 4 where membership is much more relevant.

Subsection (b) quite pertinently points out that the criminal acts must be carried out by two or more persons belonging to, or who are members of, the same criminal gang. The most logical conclusion would be that more than one person may contribute to the pattern if the acts are committed on separate occasions under subsection (a). Since POCA is attempting to prohibit gang activity, it is difficult to imagine that the Legislature meant that only one person at a time may commit a crime on separate occasions.

A proper construction of subsections (a) and (b) is also absent in *Thomas*. The approach by the State was to enumerate the charged offences of the individual accused and then, by proof of those offences, a pattern would be constituted.<sup>701</sup> Although this is not an incorrect approach in itself, the Court failed to interact with the individual requirements under subsections (a) and (b). Charge 147, for example, stated Accused 1, 16 and 19, *inter alia*, conspired to commit murder.<sup>702</sup> No mention is made *here* that Accused 16 was a member of a different gang, the 26s.<sup>703</sup> If only two persons, say Accused 16 and 19, had participated in this murder conspiracy, it would not have qualified as a predicate offence which could contribute the pattern because Accused 16 and 19, participating in a crime on the same occasion, were not members of the same gang.

US case law however indicates that it is not necessary for there to be both proof of a commission of offences on different occasions *as well as* that it be effectuated by different persons, but the prosecution may do so.<sup>704</sup> In other words, the predicate offence of a single person may be used to satisfy a pattern of criminal gang activities of another when the crimes are committed on different occasions.<sup>705</sup> Such an approach, if it were to be followed in South Africa, basically renders the distinction superfluous because under either subsection (a) or (b), the crime(s) would be able to be imputed to any other person who is a member of or active participant in the gang if he or she is charged with a Chapter 4 offence. This would seem to be the approach in

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<sup>700</sup> *Thomas* at 481.

<sup>701</sup> The judgement in *Thomas* is indicative. See 4 5 1 2 above.

<sup>702</sup> *Thomas* at 128.

<sup>703</sup> See *Thomas* at 481.

<sup>704</sup> *People v. Loeun* 947 P.2d 1313 (1997) at 1317. Also see *People v. Tran* 51 C.4th 1040 (2011).

<sup>705</sup> See *Fellows v. Dexter* 551 F.Supp.2d 969.

any case under the *Thomas* judgment. As already pointed out, no effort is made to truly interact with the requirements for a pattern of criminal gang activity. There was also, naturally, no attempt made in determining whether each act fell under subsection (a) or (b). All that seems to be required, is that the offence was committed by a gang member or an active participant in the gang.

An alternative view (and simple answer) to this issue may be that the distinction is that the Legislature merely intended to show that the predicate offences could be effectuated either on separate occasions or on the same occasion and that there was no intention to distinguish these two subsections by adding further requirements under subsection (b). The counterpoint to that would be that by enumerating subsections (a) and (b) is verbose and unnecessary and could have been worded more simply. The second counterpoint pertains to the Afrikaans text of POCA. The Afrikaans text makes use of the word “of” (which means “or” in English). Despite the Afrikaans text not being the signed text, it does seem to indicate that these are clear and separate manifestations. The final counterpoint points towards the formatting of the definition. Subsection (5) of the definition of unlawful activity in POCA reads as follows:

Nothing in this Act or in any other law, shall be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that

- (a) any offence or unlawful activity concerned occurred; or
- (b) any proceeds of unlawful activities were derived, received or retained,

before the commencement of this Act.

The phrase “before the commencement of this Act” is clearly formatted in such a way to indicate that it pertains to both subsections (a) and (b) and not just the latter. This is not the case with the definition of a pattern of criminal gang activity.

Determining whether subsections (a) and (b) are alternatives with different requirements is not merely a semantic exercise. Concluding that subsection (b) has separate or *additional* requirements, leads to the further conclusion that subsection (a) does *not* demand these requirements. Therefore, certain important inferences may be made based on this. Firstly, *anyone* may contribute to a specific gang pattern of criminal gang activities if it is done on separate occasions – thus – alone and without the assistance of gang members. In other words, members of the general public or fringe gang members may contribute to the pattern. Secondly, two or more persons

are not required to act on separate occasions. One person, individually, may also contribute to the pattern.

#### 4 5 2      *The substantive offences in section 9*

Several gang-related offences are created in section 9 of POCA.

- (1) Any person who actively participates in or is a member of a criminal gang and who
- (a) wilfully aids and abets any criminal activity committed for the benefit of, at the direction of, or in association with any criminal gang;
  - (b) threatens to commit, bring about or perform any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang; or
  - (c) threatens any specific person or persons in general, with retaliation in any manner or by any means whatsoever, in response to any act or alleged act of violence,

shall be guilty of an offence.

- (2) Any person who

- (a) performs any act which is aimed at causing, bringing about, promoting or contributing towards a pattern of criminal gang activity;
  - (b) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about, perform or participate in a pattern of criminal gang activity; or
  - (c) intentionally causes, encourages, recruits, incites, instigates, commands, aids or advises another person to join a criminal gang,
- shall be guilty of an offence.

Each of these crimes will be constructed below with reference to the objective (*actus reus*) and subjective elements (*mens rea*).

#### 4 5 2 1      ***Section 9(1)(a): aiding and abetting a criminal gang***

The core elements of this crime are:

- (i) intentionally;
- (ii) providing assistance;
- (iii) by acting in association; or at the direction of; or by benefitting a criminal gang;
- (iv) through a criminal activity and
- (v) gang membership or active participation in a criminal gang



## 4 5 2 1 1      *The crime in general*

The crime contemplated in this section, at first glance, seems to require some act of assistance amounting to accomplice liability. This alludes to the commission of some “criminal activity” by someone other than the accused. Accessorial liability arises when someone provides some form of intentional assistance or furtherance of a crime. His or her contribution does not satisfy the definitional requirements of the crime and is thus not a co-perpetrator but does further or assist the crime in some fashion.<sup>706</sup> It does however appear that such a strict interpretation of the subsection is not followed in practice.<sup>707</sup> The Court in *Thomas* relied on a myriad of offences which did not constitute accessorial liability and mainly included charges of murder which satisfied the conduct element. Any criminal activity which furthers gang-related matters seems to constitute “aiding and abetting” in terms of this subsection.

In *Jordaan*, Binns-Ward J considered the meaning of “aids and abets” under this subsection and held that “[t]he expression (...) means to assist in or facilitate the doing of something or to give counsel or encouragement in respect of its doing”.<sup>708</sup> Binns-Ward J also refers to the *Dictionary of Legal Words and Phrases*<sup>709</sup> which states that

[i]f a person assists in or facilitates the commission of a crime, if he gives counsel or encouragement, if, in short, there is any co-operation between him and the criminal, then he “aids” the latter to commit the crime (...)<sup>710</sup>

The Court therefore, correctly, comes to the conclusion that a principal actor cannot be held responsible under this provision – only those who are not the principals to a crime can be said to “aid and abet” in a crime.<sup>711</sup> Such a person facilitates the commission of a crime but does not personally satisfy the definitional elements of a

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<sup>706</sup> *S v Williams en 'n Ander* 1980 (1) SA 60 (A). See Kemp et al *Criminal Law* (2015) 273-275. Also see Burchell *Principles* 505-512 where the author highlights the theoretical and practical complexities relating to accomplice liability.

<sup>707</sup> See *S v Thomas* 2015 JDR 1932 (WCC).

<sup>708</sup> *Jordaan* at 134.

<sup>709</sup> RD Claassen *Legal Words and Phrases* (1997).

<sup>710</sup> *Jordaan* para 134; see Claassen *Legal Words and Phrases* s.v. “Aid and abet” where the judgement of *R v Van Niekerk* 1944 EDL 202 is referred to under this definition.

<sup>711</sup> *Jordaan* para 134.

crime and his or her contribution is therefore accessorial in nature.<sup>712</sup> A person charged with the offence can therefore never be the principal perpetrator. He or she, for example, can never be the murderer or the assaulter (either personally or through the common purpose doctrine).

Section 9(1)(a) does not require the crime that the accused is assisting in to be one of the listed crimes in Schedule 1 of POCA. There is only mention of aiding and abetting “any criminal activity” which means that the accused can assist in *any* statutory or common law crime to satisfy this requirement. Snyman puts forward certain examples of how this might manifest, including where the accused acts as accountant or messenger for the criminal gang or makes his house available for the gang to use for a meeting.<sup>713</sup> Criminal activity implies unlawful or illegal activity. The examples the author provides, although not patently unlawful or illegal, are linked to underlying criminal activities. Where someone acts as the accountant for the criminal gang, he may be facilitating money laundering or racketeering. If the person provides his house for a meeting, that meeting may be used to conspire about future criminal endeavours and where the members of the criminal gang are incited to commit these criminal endeavours. The same holds for when the accused acts as a messenger. He or she might be acting as the messenger for the communication of an instruction to commit murder.

Merely assisting in a noncriminal fashion will not constitute a contravention of the offence if one additionally considers the requisite form of intention. The accused must *wilfully* benefit; act at the direction of or in association with the criminal gang in any *criminal* activity. The accused must thus know he or she is committing an offence while aiding and abetting (for example murder).

In *Jordaan*, it was found that the State failed to prove that the four relevant accused had aided and abetted in the commission of the offences. The Court in particular pointed out that the mere presence of the accused at murder scene is insufficient to “constitute assistance, facilitation or co-operation”.<sup>714</sup>

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<sup>712</sup> See Chapter 1 1 above; Kemp *et al* 247; see also DC van der Linde *’n Patroon van kriminele bende-aktiwiteite: Die oplossing tot Suid Afrika se bendemisdaad of ’n wit olifant? ’n Kritiese, regsvergelykende en konstitusionele studie van Hoofstuk 4 van die Wet op die Voorkoming van Georganiseerde Misdaad 121 van 1998* LLM dissertation, Stellenbosch University (2015) 21.

<sup>713</sup> Snyman (1999) *South African Journal of Criminal Justice* 218.

<sup>714</sup> *Jordaan* para 134.

STEP, by comparison, is not as broadly worded as the aiding and abetting provision under POCA. The related provision requires that the person promoting, furthering or assisting in any criminal conduct to be convicted “of that *felony*”<sup>715</sup> and thus requires the act of assistance to amount to a crime of a more serious nature.<sup>716</sup> Examples from STEP case law shows similar instances of where the subsection will be contravened and includes the sale of illicit drugs for the gang’s benefit<sup>717</sup> or assisting in an attempted robbery.<sup>718</sup>

#### **4 5 2 1 2      *Benefit, association or direction/instruction***

Gang members or active participants in a gang will contravene this subsection when they aid and abet in criminal activity which is either for the benefit of the gang; at the direction of that gang or in association with that gang. The disjunctive “or” between the last two terms seems to indicate three alternative ways to contravene the subsection and are not required to be all present in one factual scenario. It is difficult to envisage scenarios where aiding and abetting a gang, either at the direction or in association with a gang, would not also benefit that gang. The only scenario where the benefit alternate will come into play, is where a gang member or active participant in a gang acts alone. Where a gang member acts alone (thus not at the direction or in association with a gang), his or her assistance *must* benefit the gang. When a gang member acts alone in a criminal endeavour, which does not benefit the gang, that action cannot be construed as aiding and abetting a criminal gang.

Aiding and abetting a criminal gang which is not at the direction of, in association with or for the benefit of the gang, cannot be construed as a contravention of section 9(1)(a). This was in fact the case in *Thomas* where Accused number 6 was acquitted of the charge of contravening section 9(1)(a) due to a murder being carried out based on a personal vendetta between the deceased and the accused.<sup>719</sup> He was thus not aiding and abetting the gang. The murder of future witnesses in a criminal trial against

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<sup>715</sup> Own emphasis.

<sup>716</sup> § 186.22(b)(1).

<sup>717</sup> See *People v. Ferraez* 112 C.A.4th 925 (2003); BE Witkin, NL Epstein & members of the Witkin Legal Institute *Witkin California Criminal Law* 4 ed para 37.

<sup>718</sup> See *People v. Rodriguez* 55 C.4th 1125 (2012); BE Witkin, NL Epstein & members of the Witkin Legal Institute *Witkin California Criminal Law* 4 ed para 37.

<sup>719</sup> See *Thomas* at 525.

gang members;<sup>720</sup> the murder of competition in the drug trade,<sup>721</sup> as well as the murder of members from a rival gang<sup>722</sup> were all found to contravene the subsection. Fortuin J did not elaborate much as to which alternate each of these contravened but in those scenarios they could easily fall under any of the alternatives. These examples however do have a common theme: competition. As with any other business, a gang functions to make profit, eliminate the competition and strive towards having a monopoly in the market.<sup>723</sup>

#### **4 5 2 1 3      *Intention***

Section 9(1)(a), as mentioned above, makes use of the word “wilfully” at the beginning of the definition. The use of this word indicates some form of *dolus* (including, possibly, *dolus eventualis*). Burchell submits that the use of “wilfully” could point to *dolus directus* as the requisite form of intent.<sup>724</sup> An accused would have to direct his mind at achieving two things. He must firstly aim to aid and abet in a criminal gang. Secondly, this wilful act of aiding and abetting must be directed at benefiting the criminal gang; directed at associating with the gang or acting wilfully at their direction.

Burchell’s construction is preferred and would necessarily exclude instances of personal vendettas satisfying the definitional requirements, for example where an accused foresees a possibility that the murder of his personal nemesis would benefit his gang. In that scenario the mind of the accused was not *directly* aimed at benefitting the gang. If Burchell’s construction is not followed, then a court could easily infer that the accused possessed *dolus eventualis* during the commission of the crime and foresaw the possibility that the murder could benefit the gang. The benefit alternate, as mentioned above, would mostly come into play if the accused neither acted at the

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<sup>720</sup> See for example *Thomas* at 525-526. This appears to be the Court’s inference from the evidence. This inference is however not properly formulated or elucidated. The Court reasoned that the deceased was murdered on instruction from someone within the gang and that the accused parties carried out this instruction due to his membership. It is mentioned by one of the accused parties that he had no motive to kill the particular deceased, but the Court refers to the fact that two other victims were murdered in order to prevent them from testifying against gang members and thus suggesting that this particular deceased was killed based on the same motive.

<sup>721</sup> *Thomas* at 526 with regards to Accused number 9.

<sup>722</sup> *Thomas* at 526 with regards to Accused numbers 10, 11, 13 and 14.

<sup>723</sup> See further Pinnock *Gang Town* 96 and 2 2-2 3; 4 5 2 3 above.

<sup>724</sup> Burchell *Principles* 910.

direction of, nor in association with, a criminal gang. If the possible benefit only becomes patent after the commission of the crime, then the benefit requirement would also not be satisfied. This would not even constitute *dolus eventualis* and is merely an incidental or collateral benefit. For example: a gang member, Z, aids in the murder of Y (with non-gang members) because Y had an affair with Z's wife. It later turns out that Y was going to testify against Z and his fellow gang members. This factual scenario should not satisfy the elements under this particular subsection<sup>725</sup> because Z was not *wilfully* aiding and abetting, or benefitting the criminal gang but his will was aimed at a personal benefit.

The sentence enhancement of STEP refers to "(...) specific intent to promote, further, or assist in any criminal conduct by gang members (...)"<sup>726</sup> which is semantically identical to the POCA text. The "specific intent" requirement under STEP is congruent with Burchell's submission of *dolus directus* and then further bolsters such an interpretation. This sentence enhancement will be discussed in greater detail below.<sup>727</sup>

#### **4 5 2 2      Section 9(1)(b): Threatens to commit, bring about or perform any act of violence or any criminal activity**

The core elements of this crime are:

- (i) intentionally and unlawfully;
- (ii) threatening violence or criminal activity;
- (iii) gang membership or active participation in a gang

#### **4 5 2 2 1      The crime in general**

The scope of this crime seems to be substantially similar to the common law crime of assault as well as offences under the Intimidation Act 72 of 1982 ("the Intimidation Act").<sup>728</sup> It is useful to analyse common law assault and the offences under the Intimidation Act in order to construct the corresponding offence under POCA.

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<sup>725</sup> It will also not satisfy the requirement that the crime be committed in association or at the direction of a criminal gang.

<sup>726</sup> § 186.22(b)(1).

<sup>727</sup> See 4 5 3 as well as 5 4 below.

<sup>728</sup> See Snyman (1999) *South African Journal of Criminal Justice* 219.

Subsection 9(1)(b) of POCA specifically makes reference to *threats* of violence and not actual or completed acts of violence. Kemp *et al* defines common law assault (or “common assault”) as

the unlawful and intentional application of force to the complainant, or inspiring the belief of imminent use of force against the complainant.<sup>729</sup>

The wrongful application of force or the threat thereof were both considered as *iniuria* under Roman-Dutch law.<sup>730</sup> The South African law relating to assault has however primarily been influenced by English law which differentiated between the distinct crimes of battery and assault. While the crime of battery aimed to prevent retaliation of a physically harmed person by providing the victim with compensation, the crime of assault aimed to protect the dignity of the victim by compensating inflictions of harm on the victim’s psychological well-being. Thus, by inspiring the subjective belief in the victim that he might suffer physical harm, it will be enough to constitute this harm without the infliction of actual physical harm.<sup>731</sup> South African law amalgamated the English concepts of assault and battery into the single concept of assault.<sup>732</sup> The Legislature also adopted this position in section 152 of the Transkei Penal Code of 1886.<sup>733</sup>

#### **4 5 2 2 2      *Interpretation of section 9(1)(b) through the common law***

The offence under POCA overlaps specifically with the second part of the definition of common assault: the inspiration of the belief of force. A court must assess the three additional requirements (over and above unlawfulness and intention) for an assault

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<sup>729</sup> Kemp *et al* *Criminal Law* (2015) 308. Also see Burchell *Principles* 591.

<sup>730</sup> *Digesta* 47.10.15.1 as well as *Voet* 41.10.7. Also see *R v Jolly and Other Appellants* (1923) AD 176 at 179.

<sup>731</sup> Burchell *Principles* 592.

<sup>732</sup> Burchell *Principles* 592-593. See for instance *Jolly* at 179 where the Appellate Division pointed towards the amalgamation of concepts in legal practice and accordingly accepted it as the law.

<sup>733</sup> Section 152 stated that:

An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe on reasonable grounds that he has the present ability to effect his purpose.

See also Burchell *Principles* 578.

without physical impact through an objective lens.<sup>734</sup> There must firstly be a threat imminent or immediate harm; it must secondly be reasonable for the victim to believe this threat and lastly that the accused is capable of carrying out this threat.<sup>735</sup>

There is no mention of actual or realised violence and such conduct should fall within the scope of sections 9(1)(a) and 9(2)(a). Under common law, an accused in an assault case merely has to create the subjective belief in the mind of the accuser that there will be some use of force against him or her. This belief can be evoked not only through the conduct by the accused, but also words and gestures.<sup>736</sup> This subjective belief of the threat does not necessarily mean that the victim must experience fear due to such a threat. That is irrelevant to the court's consideration.<sup>737</sup> He or she must merely believe that the conduct of the accused will cause bodily contact with the victim.<sup>738</sup> If the victim however does not experience this subjective belief of immediate harm, then the conduct of the accused would not constitute an assault, even if that was his direct intention.<sup>739</sup>

The requirement of imminent harm will only be satisfied when the threat is present and not a future or conditional threat of assault.<sup>740</sup> In *Thomas*, however, it was accepted that a future/conditional threat of non-imminent/remote harm constituted the relevant crime in terms of section 9(1)(b). The murder of Strydom, a State witness, by Accused 4 and 5, constituted a future threat of murder towards other potential witnesses against the gang.<sup>741</sup> This conclusion seems to be a stretch of the clear statutory language, considering that there was no direct communication towards the other potential witnesses or evidence that the other witnesses subjectively experienced this murder as a threat directed towards them. There was only evidence

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<sup>734</sup> Kemp et al *Criminal Law* 310.

<sup>735</sup> *R v Sibanyone* (1940) JS 40 (T). These requirements were approvingly referred to in *S v Miya and Others* (1966) 4 SA 287 at 289. Also see Kemp et al *Criminal Law* 310.

<sup>736</sup> Kemp et al *Criminal Law* 308. The author points out that it was previously the position under English law that criminal liability would only flow from overt acts or gestures, which was based on the decision in *R v Meade and Belt* (1823) 1 Lew CC 184. This traditionally was originally followed by South African courts but the law later evolved to also allow for words to constitute an assault.

<sup>737</sup> Kemp et al *Criminal Law* 310.

<sup>738</sup> Kemp et al *Criminal Law* 310.

<sup>739</sup> Burchell *Principles* 593.

<sup>740</sup> See especially *Miya* 289.

<sup>741</sup> *Thomas* at 531.



that witnesses to Strydom's own murder were scared.<sup>742</sup> At most, the murder of Strydom could be considered a future/conditional threat that other State witnesses could face the same fate if they became State witnesses. This would also therefore constitute future, non-imminent harm.

Accused number 9, without the Court providing much details, was found guilty of contravening section 9(1)(b) through relying on his previous convictions of murder as well as carrying out robberies pertaining to threats towards his competition in the drug trade.<sup>743</sup> The Court however did not illustrate how the accused possessed the requisite intention for those murders and robberies to be received or perceived as threats or who the victims or class of this specific charge were.

These threats (by the furthest stretch of the word) are future (as well as conditional)<sup>744</sup> in nature. The Court furthermore failed to establish a single victim with regard to each of these charges – merely that the unlawful actions could be construed as threatening to a potential, theoretical or *identifiable* victim. Such an interpretation of section 9(1)(b) can therefore not be supported.

Section 9(1)(b) is therefore rendered superfluous if it cannot be stretched beyond the traditional understanding of threats of assault or violence through the inspiration of fear. This nevertheless does not justify stretching the words of the statute beyond its clear statutory meaning and resulting in the absurdity of making threats directed at (and experienced by) no one.

The second requirement of the objective test is the reasonable apprehension of harm by the alleged victim. There appears to be two schools of thought with regards to the reasonableness of the apprehension. The first school submits that an unreasonable apprehension would not constitute an assault.<sup>745</sup> The second school holds that requiring such an objective evaluation of a vulnerable or anxious individual is absurd and that the action by the accused remains reprehensible despite the fact

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<sup>742</sup> *Thomas* at 531.

<sup>743</sup> *Thomas* at 533.

<sup>744</sup> Kemp et al point out that there was previously uncertainty and controversy in the law of whether a conditional threat can constitute an assault. This dispute was however resolved in *Miya*. See Kemp et al *Criminal Law* 310-311; also see Burchell *Principles* 598.

<sup>745</sup> See Kemp et al *Criminal Law* 311.

that the victim's apprehension was unreasonable.<sup>746</sup> The decision in *Thomas* also does not appear to take cognizance of this analogous requirement under the common law with regard to threats of assault or violence. There was no mention of the apprehension of the alleged victims of the offence. In fact, the specific victims were not identified by the State (or the Court) but rather a hypothetical category or class of people. From this it does appear as if there is less focus on the victim's identification and more on the unlawful act of making a threat to a potential class of victims. It must however be questioned whether something can be construed as a threat if there is no direct (and identified) victim to experience it as such.<sup>747</sup> There appeared to be no evidence before the Court that the alleged intended victims experienced the actions of the relevant accused parties as a threat or even that the accused intended for it to be a threat. The conclusions reached by the Court appear to be its own speculation. It is submitted that merely having an identifiable class of victims is not sufficient. There must also be sufficient evidence that this class of victims experienced the relevant actions as a threat. The construction of this crime under *Thomas* seems to imply that it is not a consequence crime, as the mere making of the threat without any cognisable consequence is sufficient to secure a conviction.

The last objective requirement is that the accused must have the capability to effectuate the assault. There appear to be two legs to this enquiry. The accused must firstly have the present capability to carry out the threat. Where an assault is impossible to carry out, the conduct is undeserving of criminal sanction. The subjective

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<sup>746</sup> See Burchell *Principles* 599. Burchell also submits that if someone intentionally induces an unreasonable apprehension that this would "clearly" constitute an assault. Also see Kemp et al *Criminal Law* 311.

<sup>747</sup> This paradox is reminiscent of the philosophical question of whether a falling tree can make sound when there is no one to perceive the sound. This conundrum was apparently originally posited (albeit a slightly different manifestation) by Irish philosopher George Berkeley in his book *A Treatise Concerning the Principles of Human Knowledge*. He questions whether trees in a park, books in a closet or chairs in a parlour can exist if there when no one is there to perceive them. He seemingly answers this conundrum by stating that "[t]he objects of sense exist only when perceived". Something such as a criminal threat must be directed at and perceived by *someone*. The threats envisaged here do not exist independently; in a vacuum where perception or experience of them need not be experienced. See G Berkeley & C Porterfield Krauth *A Treatise Concerning the Principles of Human Knowledge* (1874) 202; 214.

fear of the victim is not the sole consideration in South African law.<sup>748</sup> The fear would additionally be unreasonable if it was clear to the victim that the threat could not be carried out.<sup>749</sup> In addition to having the capability, the second leg of the enquiry, relates to the state of mind of the victim and whether he or she believed that the accused was going to realise the threat.<sup>750</sup> Once again, if courts had to follow the interpretation in *Thomas*, it becomes unnecessary to show a victim's apprehension of the ability of the accused to effectuate the threat. The ability of the accused also becomes somewhat of an *ex post facto* conjecture by the court. The threats in *Thomas* were separated in time and space from the category of alleged future victims. An evaluation (by the victims) as to whether the accused would be able to carry out the threat and whether the category of victims believed that he was capable, was impossible.

Reconciling the traditional concept of a criminal threat of violence with the offence contained in section 9(1)(b) of POCA, seems impossible. With the limited information available from *Thomas*, it seems that it is sufficient for the State to show that there was conduct by the accused which could be construed as a threat towards an identifiable class of persons and that threatening conduct can be separated in time and space. If we however consider the overarching reasons for the enactment of POCA, namely to supplement the ineffectual common law, then an offence that transcends and expands the common law crime of assault becomes legislatively understandable (even if it cannot be fully supported here) The interpretation of the offence in *Thomas* has led to seemingly absurd consequences. Such absurdities could be avoided if there is some form of evidence to the subjective state of mind of the victim.

The second part of the offence in section 9(1)(b) relates to the threat of "any criminal activity". A strict adherence to the language of the statute would lead to a conclusion that a threat of *any* criminal activity would satisfy the requirement. If A, a gang member, were to threaten B, a rival gang member, with extortion by his gang, he could be liable under this offence. When A, in association with several gang members, threatens to

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<sup>748</sup> See Kemp et al *Criminal Law* 311. The author here relies on the English authority of *Stephens v Meyers* (1830) 4 CAR & P 350 where it was held that the accused must at all relevant times have had the ability to carry out the relevant threat.

<sup>749</sup> Kemp et al *Criminal Law* 311.

<sup>750</sup> See Snyman *Criminal Law* 6 ed (2014) 450; *Miya* at 277. See also *R v Gondo* 1970 (2) 306 (R) at 307.

kill B's dog,<sup>751</sup> this too would seemingly be a sufficient threat due to it being a criminal activity. The threat must merely be executed by the criminal gang or with the assistance of the gang.

#### **4 5 2 2 3      *Interpretation of section 9(1)(b) through the Intimidation Act 72 of 1982***

There are certain parallels between section 9(1)(b) of POCA and section 1(b)(i) of the Intimidation Act. Section 1(b)(i) states that

(1) Any person who- (...)

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person (...)

shall be guilty of an offence (...)

This offence creates a substantially broad offence especially in terms of the very low threshold of intention. *Dolus eventualis* in its broadest and most liberal manifestation is present by proscribing conduct that may have the effect of inducing fear in someone who may consequently fear their safety; that of their property or that of another.

There is once again a subjective inquiry into the victim or a potential victim's state of mind. The accused must have at least foreseen that his or her conduct evoked fear in the victim. The commonality between threats of violence under the common law and under the Intimidation Act is the evocation of a sense of fear or at very least having the intention to evoke such fear.

Burchell notes that the legislature and the judiciary have refrained from relying on this broad form of intention ("natural and probable consequences" of an act) and rather opted to proscribe behaviour in terms of *dolus eventualis*, at least.<sup>752</sup> By proscribing behaviour based on natural and probable consequences, the accused stands the risk to be held liable for consequences he or she did not intend or at least foresee to

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<sup>751</sup> Which is an offence under the Animals Protection Act 71 of 1962.

<sup>752</sup> Burchell *Principles* 355-356; 593.

happen.<sup>753</sup> The phrase “natural and probable consequences” is as far-reaching and uncertain as the Court’s approach in *Thomas*. But even this phrase is limited by the qualification that there must be “a person *perceiving* the act, conduct, utterance or publication”.<sup>754</sup> The scope of this offence under POCA is therefore also not congruent with the Intimidation Act. The Intimidation Act further affirms the importance of the victim’s subjective appreciation of the threat that is being made.

Burchell further submits that the type of threats the Intimidation Act is attempting to prohibit are, *inter alia*, threatening witnesses from testifying in court and furthermore posits that that type of conduct requires subjective intent.<sup>755</sup> Witness intimidation is exactly the type of intimidation that the Court in *Thomas* found Accused numbers 4 and 5 guilty of. There was however a complete disregard of the subjective states of mind of the two accused. There was no evidence as to whether they had intended for the murder of the State witness to serve as a threat for other potential witnesses.

#### **4 5 2 2 4      *Intention***

The intention, it appears from the discussion above, differs greatly from criminal threats of violence under the common law or the Intimidation Act. There appears to be no need for a subjective victim-based approach under this provision if *Thomas* is taken as binding authority.<sup>756</sup> The requisite intention is more closely related to that required in terms of section 1(b)(i) of the Intimidation Act which provides for a very liberal manifestation of *dolus eventualis*. But as mentioned above, even the Intimidation Act requires there to be a victim to appreciate the threat.

*Dolus eventualis* thus seems to be a sufficient form of fault. The *dolus* specifically relates to having the intention to bring about an act that could objectively be construed as a threat of violence or criminal activity. There is apparently no need for there to be an actual victim of these threats; the mere *making of the threat* is sufficient. Evoking an apprehension of harm is therefore not required.<sup>757</sup> An accused would therefore not

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<sup>753</sup> Burchell *Principles* 355-356.

<sup>754</sup> Section 1(b)(i) of the Intimidation Act (own emphasis).

<sup>755</sup> Burchell *Principles* 593. The author rejects Snyman’s interpretation that negligence would be a sufficient form of fault here. See Snyman *Criminal Law* 6 ed (2014) 457.

<sup>756</sup> In the Western Cape, at least. As of the time of the submission of this dissertation, no other reported judgement on Chapter 4 of POCA by another division of High Court could be identified.

<sup>757</sup> See Burchell *Principles* 599. See also Snyman *Criminal Law* 452-453.

be able to submit to this charge under POCA that the threat was made in jest<sup>758</sup> or that they were unaware of the fear experienced by the potential victims.<sup>759</sup>

It is submitted that the Court's interpretation in *Thomas* is incorrect and strains the meaning of the statutory text and is incongruent with the established principles of criminal threats under the common law and the Intimidation Act. The approach in *Thomas* shows a complete disregard of the state of mind of the accused.

Courts should at very least enquire as to the intention of the accused – even though there is very little guidance in the statutory text – the phrase “threatens to bring about or perform” indicates that the accused is in some fashion directing his or her will to cause “any act of violence or any criminal activity by a criminal gang or with the assistance of a criminal gang”.

#### **4 5 2 2 5      *Policy and constitutional considerations***

The Organised Crime Bill,<sup>760</sup> which preceded POCA, had an explicit provision prohibiting a contravention of one of the gang-related offences if it was based on “speech alone”.<sup>761</sup> There was however a three-pronged *proviso*. Speech alone would constitute a gang-related crime (in conjunction with one of the gang-related offences in terms of section 42(1)) if the violence was threatened against a specific person; the accused had the apparent ability to effectuate the threat and physical harm was likely occur. This *proviso* constituted a codification of the common law requirements for the inspiration of the belief of imminent harm.

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<sup>758</sup> See *S v Mtshunye* 1994 (2) SACR 482 (T) at 458, Botha J held that a serious murder threat which is taken as a joke by the victim, does not constitute a crime. Conversely, if a murderous joke is made, and that joke is taken seriously by the complainant to the extent that it evokes an apprehension of fear, the accused may be liable for assault. Also see Snyman *Criminal Law* 452.

<sup>759</sup> See Snyman *Criminal Law* 452.

<sup>760</sup> See discussion above at 4 2.

<sup>761</sup> Section 42(2) stipulated that:

No person shall be convicted of a contravention of subsection (1) based upon speech alone, except where it is shown that the speech itself threatened violence against a specific person, that the accused person had the apparent ability to carry out the threat, and that physical harm was eminently likely to occur.

The inclusion of this clause in the Bill appeared to safeguard otherwise constitutionally protected activities, such as the freedom of expression,<sup>762</sup> from prosecution under POCA.<sup>763</sup>

The final text of POCA excluded this clause in favour of section 9(1)(b) and (c) which are crimes that can be committed by “speech alone” (albeit a broad interpretation of “speech”).<sup>764</sup> The exclusion of the provision and its exceptions has led to absurdities. The first exception, for example, requiring that the speech be directed to a specific person would have prohibited the truly puzzling conclusion by the Court in *Thomas*. This subsection is therefore potentially sweeping in its application. For this reason, the wording contained in the Bill is favoured. This approach incorporated the common law requirements for the inspiration of the belief of imminent harm and limited potentially overbroad (and absurd) interpretations such as in *Thomas*.

#### **4 5 2 3      Section 9(1)(c): Threats of retaliation**

The core elements of the crime are:

- (i) intentionally and unlawfully
- (ii) threatening a specified person or persons in general
- (iii) in response to acts or alleged acts of violence;
- (iv) gang membership or active participation

This offence is merely a subspecies of the previous offence and is reminiscent of section 1A of the Intimidation Act.<sup>765</sup> The offence is however much more specific in nature and specifically targets threats of retaliation. These acts of retaliation must be in response to acts of violence or alleged violence. The offence appears to attempt to curb violence perpetrated between rival gangs.<sup>766</sup> This type of violence is commonly associated with conflicts over gang territory over the sale of illicit goods, especially

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<sup>762</sup> In terms of section 14 of the Constitution.

<sup>763</sup> Cowling (1998) *South African Journal of Criminal Justice* 371.

<sup>764</sup> Cowling also suggested a broad interpretation of speech and refers to the US Supreme Court decision in *Texas v Johnson* 491 US 397 (1989), where the Court found that the burning of the American flag constituted speech and was consequently deserved constitutional protection. See Cowling (1998) *South African Journal of Criminal Justice* 372 (and fn 118).

<sup>765</sup> The heading for this section reads “Intimidation of general public, particular section of population or inhabitants of particular area”.

<sup>766</sup> See generally I Kinnes “Gangs, drugs and policing in the Cape Flats” (2014) *Acta Criminologica* 14.



drugs but also includes prostitution and robbery.<sup>767</sup> It has also been reported that the majority of gang violence in the Western Cape is due to conflicts surrounding the expansion or control of drug territories held by rival gangs.<sup>768</sup> Local communities, especially communities in the Western Cape, fall victim to this type of violence which is often associated with the use of weapons and loss of life of associated bystanders.<sup>769</sup> The offence is in theory a laudable move by the legislature, due to ongoing violence between gang members which often claims innocent lives.<sup>770</sup>

The phrase “in any means or manner whatsoever” creates a substantially broad offence which is ripe for prosecutorial abuse or overbroad judicial interpretation. The provision does not require the act of retaliation to have a violent or criminal nature, despite these acts of retaliation mainly manifesting as acts of violence. This wording could lead to absurdities qualifying as acts of retaliation due to noncriminal behaviour also qualifying as the requisite acts of retaliation. Would a personal insult, such as having an affair with a rival gang member’s wife, be construed as retaliation “in any manner or by any means whatsoever”? Reading the statutory text as is, the answer could be in the affirmative.

The requisite intention, just as with the preceding crime described above, is quite vague. *Dolus eventualis* would seem to be sufficient.

This offence, despite its broad wording, was surprisingly not used in *Thomas*.

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<sup>767</sup> See, for example, the facts in *Ceaser* at 5. There was a violent outbreak after apparent faction fighting within the Americans gang itself. Also see *Thomas* 494 where a witness, Shafiek Staggie, testified to the fact of gangs operating within certain territories. He submitted that a member of the 28s could “request” a certain territory of the 26s. Should such a “request” however be refused, then such refusal shall result in death.

<sup>768</sup> South African Police Service *Annual Crime Report 2015/2016: Addendum to the SAPS Annual Report* (2016) 80.

<sup>769</sup> A Standing “The threat of gangs and anti-gangs policy: Policy discussion paper” (2005) Paper 116 *Institute for Security Studies* 1 2.

<sup>770</sup> See L Issacs & S Fisher “Weekend Gang Violence Claims 8 Lives in Manenberg” (11-04-16) *Eye Witness News* < <http://ewn.co.za/2016/04/11/Weekend-gang-violence-claims-8-lives-in-Manenberg>> (accessed 10-09-2016) where it was reported that there were “gun battles” and hostage situations between four rival gangs in Manenberg. Also see M Mortlock “Gangsterism Must Fall: Residents in Gang Violence-Stricken Areas Live in Fear” (07-02-2016) *Eye Witness News* <<http://ewn.co.za/2016/02/07/WC-victims-of-gang-violence-speak-out-about-terrifying-daily-routines>> (accessed 10-09-2016).

## **4 5 2 4      Section 9(2)(a): Bringing about a pattern of criminal gang activity**

The core elements of this crime are:

- (i) intentionally and unlawfully;
- (ii) bringing about a pattern of criminal gang activity

### **4 5 2 4 1      The crime in general**

The conduct and intention elements contemplated in section 9(2)(a) are not readily susceptible to clear and unambiguous interpretation. Just as with the other offences in subsection (2), this subsection does not require the accused to be a member of a criminal gang or even an active participant. When someone who is not a member of a gang commits several offences that bring about, causes or contributes towards a *pattern of criminal gang activity*, that scenario would fall within the proscribed conduct.

A “pattern of criminal gang activity” is defined in POCA and has been discussed above.<sup>771</sup> The same uncertainty as to whether courts should strictly follow the statutory definition or “whether it also bore the meaning denoted by the words making it up used in their ordinary sense”<sup>772</sup> thus also applies here. Binns-Ward J in *Jordaan* however made the following finding in relation of a charge of contravening section 9(2)(a):

In my judgment the state failed to adduce evidence to prove a relevant ‘pattern of criminal gang activity’, whether in the defined sense of the term or the ordinary meaning of those words, to which the actions of the accused could be related for the purposes of s 9(2)(a).<sup>773</sup>

This provides judicial authority that the term “pattern of criminal gang activity” could possibly be used not only as defined in section 1 but also in the ordinary or nontechnical sense.

The conduct of the accused must result in a “pattern of criminal gang activity” as defined in Chapter 1. If the statutory definition is followed strictly, then this pattern may only consist of two or more offences listed in Schedule 1 of POCA. The accused is therefore limited to a fixed, albeit broad, array of crimes in which the conduct of the accused may result.

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<sup>771</sup> See 4 5 1 2 above.

<sup>772</sup> *Jordaan* para 136.

<sup>773</sup> *Jordaan* para 136.

Snyman argues that the ambit of this offence is so broad that it, unlike many of the offences in Chapter 4, goes beyond the ambit of existing common law and statutory crimes.<sup>774</sup> The offence transcends co-perpetration, accessorial or anticipatory liability because those forms of liability require the actual commission of an offence.<sup>775</sup> It is submitted that this interpretation is incorrect. The accused's conduct must result in a "pattern of criminal gang activity". The definition of this term starts with the phrase "includes the commission of two or more *criminal offences* referred to in Schedule 1 (...)". Section 9(2)(a) comes into operation if the accused "performs any act which is aimed at causing, bringing about, promoting or contributing towards" such a pattern. Although 9(2)(a) uses the term "any act" – such an act will necessarily be accessorial in nature as it must *bring about, promote or contribute* to this pattern which consists of criminal offences.

#### **4 5 2 4 2      *Intention***

The objective of the accused is to bring about a pattern of criminal gang activity. Whether the pattern does eventually manifest *in fact* is not of importance because the State only has to show that it was the accused's objective to bring about this pattern. This is evident from the words "*aimed* at causing, bringing about or promoting or contributing towards (...)"<sup>776</sup> which does not require a materialisation of such a pattern. *Dolus directus* might be the requisite form of intention here. The word "aimed" is used at the beginning of the definition, suggesting that the actions of the accused must be directly aimed at bringing about the proscribed conduct. As pointed out in *Jordaan*, there has to be "a relevant connection between the acts of the accused and a pattern of criminal gang activity."<sup>777</sup> The pattern therefore cannot be brought about unknowingly, accidentally or coincidentally.

A "pattern of criminal gang activity" is a defined legal term. Whether the conduct of the accused must be aimed to promote a pattern of criminal gang activity in the legal-technical sense, is uncertain. When a person encourages a gang member to commit an assault, not knowing whether that person would commit a Schedule 1 offence

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<sup>774</sup> See Snyman (1999) *South African Journal of Criminal Justice* 220-221.

<sup>775</sup> See Snyman (1999) *South African Journal of Criminal Justice* 220.

<sup>776</sup> Own emphasis.

<sup>777</sup> *Jordaan* para 135.

again, could that act of encouragement qualify in terms of section 9(2)(a)? His or her (direct) intention was never to contribute or to further the pattern but only to promote the singular criminal offence. The question to this answer is likely to be answered in the negative. It is doubted that courts would take such a formalistic view to the interpretation of this subsection. The remarks by Binns-Ward J may serve as evidence of the willingness by the judiciary to accept the definition in less strict terms. It is submitted that courts should follow a stricter approach in applying this section (and section 9(2)(b)) as their intention relates to causing *a pattern*. This section should be used against leadership figures in a criminal gang as it is likely their intention to cause the requisite pattern. Where there is evidence of the intent to participate in criminal plot involving two or more offences in Schedule 1, then that would constitute sufficient intent to commit this offence.

#### **4 5 2 5      Section 9(2)(b): Inducement to contribute to gang activities**

The core elements of this crime are:

- (i) intentionally and unlawfully
- (ii) inducing another
- (iii) to bring about or contribute to a pattern of criminal gang activity.

This subsection appears to be a subspecies of section 9(b)(a). Section 9(2)(b) seems to be targeted at leadership figures within gang structures since it punishes certain criminal orders or instructions. These leadership figures are especially difficult to prosecute in general due to the fact that they tend to distance themselves from the actual perpetration of crimes.<sup>778</sup> This section however does not require the person performing these acts to be a member of a criminal gang or even be an active participant in such a gang. This is paradoxical because these categories of persons are most likely to be members of a criminal gang or at the very least active participants. Unassociated members of the public are not usually associated with giving instructions to gang members but now they are also susceptible to be included within the long reach of POCA. A scenario where unassociated members of the public are instructing gang members is not impossible, but would in any case be included within the ambit of incitement or conspiracy.

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<sup>778</sup> See *Standing Cape Flats* 51 as well as the foreword to POCA.

The offence lists several types of unlawful conduct that cannot be easily categorised under one heading. Inciting, commanding and advising are three distinct types of conduct. Aiding someone to perform or bring about a pattern of criminal gang activity differs greatly from advising them to do the same. The common thread, save for the word “aiding”, however, seems to be an act of incitement. As described in Chapter 3 above, incitement is committed when someone attempts to provoke, procure or instigate another to commit an offence.<sup>779</sup> Stating “aiding” as an alternate in this subsection seems misplaced; it would seem to be a repeat of the conduct proscribed in subsections 9(1)(a) and 9(2)(a) and inappropriate to the common theme of incitement or inducement.

Aiding requires active participation in the proposed crime while the other alternatives merely require some form of inducement to commit the crime but no actual participation.<sup>780</sup> It may be easier for the State to secure a conviction under this provision by not requiring gang membership or active participation as a prerequisite for accountability. The State may face severe difficulties in proving this crime due to a potential lack of evidence proving the instructions.

Accused 1 in *Thomas* was found guilty under this provision. Fortuin J found that he was the leader of the 28s gang during the relevant times based on testimony by several witnesses<sup>781</sup> and was thus empowered to give orders and subsequently ordered his subordinates to execute dozens of acts of criminal gang activities.<sup>782</sup> The Court also found that there was sufficient evidence identifying Accused 1 as the instruction-giver of the relevant offences.<sup>783</sup> It was however unnecessary, but not incorrect, for the Court to first find that the accused was the leader of the criminal gang. The section clearly refers to “[a]ny person” at the beginning of the definition and would thus, as mentioned above, include non-gang members. An accused under this section also does not have to be in a position of authority over the persons he or she is instructing, as held by the Court in *Thomas*. A gang member, equal or lower in rank to another, could just as easily be held responsible for giving orders to his peer. In fact,

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<sup>779</sup> JM Burchell *South African Criminal Law & Procedure* vol I 541.

<sup>780</sup> S Hoor, JRL Milton & MG Cowling *South African Criminal Law and Procedure Volume III: Statutory Offences* (RS 17 2007) B4-51.

<sup>781</sup> See *Thomas* at 481-483.

<sup>782</sup> See *Thomas* 521-522.

<sup>783</sup> *Thomas* at 522.

Accused 1, even though he was the leader of the gang, in contrast to the practice of other gangs, participated in the execution of crimes on “street level”.<sup>784</sup>

#### **4 5 2 6      Section 9(2)(c): Gang recruitment**

The core elements of the crime are:

- (i) intentionally
- (ii) inducing a member of the public to join a criminal gang

This offence is aimed at punishing gang recruitment. A large gang membership is required to expand the criminal network and manifest and expand strongholds in gang territories.<sup>785</sup> These strongholds are then utilised and expanded for the sale of illicit goods, typically drugs such as marijuana (or “dagga”) and mandrax.<sup>786</sup> Young members of communities often fall victim to gang recruiters. They are lured through promises of gifts or drugs as remuneration and also the prospect of gangster wealth.<sup>787</sup> Recently released prisoners may also fall victim to the gang lifestyle by being promised a safe haven after a stint in prison. They may have been ostracised from their communities and gangs undertake to provide for them upon their release.<sup>788</sup> Gang leaders then lure them into the gang lifestyle by tasking them with small errands and remunerate them with drugs, accommodation and camaraderie.<sup>789</sup> Newly recruited gang members may be subjected to harsh and violent initiation rituals including the murder of members from other gangs, rape or even murder of their own relatives.<sup>790</sup> Initiates in prison gangs may be required to assault a fellow prisoner or guard. If they are however punished for the aforementioned crimes, they may not show any sign of emotion or expression of pain.<sup>791</sup>

We find some authority in international and regional human rights law in the flip-side of freedom of association, namely the freedom not to be coerced into joining groups or associations. Thus, for instance, Article 10(2) of the African Charter on

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<sup>784</sup> *Thomas* 481-482.

<sup>785</sup> See generally *Standing* (2005) *ISS* 2.

<sup>786</sup> *Standing* (2005) *ISS* 2.

<sup>787</sup> *Standing* (2005) *ISS* 2; *Wijnberg Exploration* (2012) 37.

<sup>788</sup> *Pinnock Gang Town* 89.

<sup>789</sup> *Pinnock Gang Town* 89.

<sup>790</sup> *Standing* (2005) *ISS* 2; See *Standing Cape Flats* 115.

<sup>791</sup> *Wijnberg Exploration* (2012) 27.

Human and Peoples' Rights ("ACHPR")<sup>792</sup> prohibits compelling another to join an association.<sup>793</sup> Coercing a person to join a criminal gang is therefore also in violation of a person's liberties under international law. It is however important to note that the ACHPR does not, unlike our Constitution, provide for a general or broad right to freedom of association. Article 10(1) clearly states that an individual has a "(...) right to free association provided that he abides by the law". Members of *ostensibly* criminal organisations could argue that they have protection under Article 10(1) as long as those members abide by the law.<sup>794</sup>

The fact that gang *membership* in itself is not a criminal offence but to *recruit* gang members is, seems to be an odd construction. There may be a constitutional rationale for this oddity. Gang membership only traverses the line between non-criminal to criminal behaviour when it is coupled with the offences listed in section 9. This stance is arguably to avoid violations of the right of freedom of association.<sup>795</sup> Burchell further posits that an offence of *mere membership* would constitute "the worst excesses of guilt by association", and reminiscent of the decision in *S v Nzo*.<sup>796</sup> So the odd construction under POCA s 9(2)(c) seem to have some basis in policy and constitutional consideration. But it is not at all clear that the crime under s 9(2)(c) makes sense from a criminalisation point of view.

The underlying rationale is probably that the recruiter (A) is recruiting someone (B) to eventually participate in gang-related crimes. The crime may also be viewed from a paternalistic point of view as the State has a duty to protect all its inhabitants, even those who may be involved in gang activity. Certain recruitment activities, as described above, are violent and gruesome in nature.

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<sup>792</sup> (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217.

<sup>793</sup> This forms part of the broader right of freedom of association under article 10(1) of the ACHPR. Article 10(2) is however limited by Article 29 which imposes certain duties on individuals. For example: Article 29(2) states that an individual may be obliged "[t]o serve his national community by placing his physical and intellectual abilities at its service" and Article 29(6) states that an individual must "(...) work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society".

<sup>794</sup> Freedom of association shall be discussed in more detail in below – see especially 5.4.

<sup>795</sup> In terms of section 18 of the Constitution.

<sup>796</sup> Burchell *Principles* 909; *S v Nzo* 1990 (3) SA 1 (A). See Chapter 3 below for a critical discussion on *Nzo*.



This recruitment seems to emulate the crime of incitement. The inciter is replaced by a gang-recruiter and the incitee is replaced by the potential gang member. As with section 9(2)(b), subsection (c) does not require the gang recruiter to be a member of a criminal gang him- or herself.

This is however where the comparisons with incitement stop. The crime of incitement requires the inciter to influence the mind of the incitee in order to commit a crime. In terms of section 9(2)(c), the inciter is merely inciting gang membership, which is not a crime in itself. Whether the potential gang member eventually does join the gang and commits gang-related crimes is up to him or her and falls outside of the ambit of this offence. It must thus be questioned, when relying on the traditional principles of criminal law and specifically incitement, whether someone can be held criminally liable for this quasi-incitement to do something which is not illegal. Snyman posits that this section constitutes incitement to commit conspiracy.<sup>797</sup>

The effectiveness of the provision is also doubted as there would usually be very little *evidence* of encouraging someone to join a gang. There were no convictions based on section 9(2)(c) in *Thomas*.

#### 4 5 3 Sentencing

##### 4 5 3 1 Sections 10(1)(a) and (b) of POCA

The penalties for gang-related offences are set out in section 10 of POCA. A person who is found in contravention of any offence under section 9(1) (thus aiding and abetting a criminal gang; threatening to commit, bring about or perform any act of violence or any criminal activity and threats of retaliation) and section 9(2)(a) (bringing about a pattern of criminal gang activity) will be liable either for a fine or imprisonment for a maximum of six years.<sup>798</sup>

Persons who contravene sections 9(2)(b) (inducement to contribute to gang activities) or (c) (gang recruitment) will face either a fine or a sentence not exceeding three years.<sup>799</sup> This is an extremely weak sanction, especially compared to certain sentences under Chapter 2. Where someone is found guilty of the management

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<sup>797</sup> Snyman (1999) *South African Journal of Criminal Justice* 219.

<sup>798</sup> Section 10(1)(a) of POCA.

<sup>799</sup> Section 10(1)(b) of POCA.

offence<sup>800</sup> (probably the most comparable provision to section 9(2)(b)), he or she shall be liable to a fine of R1 000 million or life imprisonment.<sup>801</sup>

#### **4 5 3 2      Sections 10(1)(c) and (d) read with section 10(2) of POCA**

The penalties for a contravention of the offences under sections 9(1), the offence under section 9(2)(a),<sup>802</sup> the offence under section 9(2)(b) as well as section 9(2)(b)<sup>803</sup> must be read with section 10(2). An accused will face a sentence enhancement in terms of section 10(2) if he or she is liable in terms of section 9(1) or 9(2)(b) of POCA and that offence is committed at or within 500 metres of a school or educational institution.<sup>804</sup> The Western Cape Government has identified the prominent gang influence and violence on the schools of the province, thus providing a public interest rationale for such a provision.<sup>805</sup> School grounds are often a market for the sale of drugs and young female learners may also fall victim and be used in human trafficking.<sup>806</sup> Section 10(2), unlike its sister provision below, does not operate independently to Chapter 4 and requires the commission of a Section 9 offence to enhance the sentence of that accused. Section 10(2) also differs from section 10(3) by using the word “committed” instead of “convicted”. This difference in wording is however not important because the use of a sentence enhancement requires a conviction before it can be employed. Merely committing an act in the factual sense

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<sup>800</sup> Section 2(1)(f) of POCA.

<sup>801</sup> Section 3(1) of POCA.

<sup>802</sup> Section 10(1)(c) of POCA.

<sup>803</sup> Section 10(1)(d) of POCA.

<sup>804</sup> With the proviso that the facility is currently open for classes or school-related programmes or when minors are using aforementioned facilities. It would thus appear if the offence is not applicable if the school is in use by persons who have reached majority but would be if it was in use by both minor persons and persons who have reached the age of majority. It would furthermore seem to be applicable if the crime(s) were committed on or near a university because the term “academic institution” would naturally include universities. This is an unnecessary distinction albeit from a noble intention to protect minors.

<sup>805</sup> Western Cape Government *Integrated Provincial Violence Prevention Policy Framework* (2013) 12. The Framework indicated that 61,6% of (22) schools in at-risk areas have been affected by robbery and violence by gangs. Also see Chapter 2 above for a broader discussion on the influence of gangs on children in general.

<sup>806</sup> Standing (2005) /SS 1 3.

(without a legal conviction) is thus irrelevant in this context. Section 10(2) is comparable to STEP which also aggravates a sentence in these circumstances.<sup>807</sup>

### **4 5 3 3      Section 10(3) of POCA**

An accused may receive a sentence enhancement in terms of section 10(3) of POCA if he or she is guilty of an offence other than those contained in Chapter 4 and it also requires the accused to have been a member of a criminal gang at the time of the commission of the crime. The State may rely on this provision in combination with any statutory or common law crime including any other offence in POCA. It is furthermore free from the complexities under sections 9 and 1 (save for the requirement of gang membership) and is easily attached to aforementioned crimes. The definition only mentions gang members and thus would seem to exclude persons who are “merely” active participants in a criminal gang.

The provision proved to be extremely useful to the Prosecution in *Thomas* and was used several times in combination with an enormous amount of offences. It was used, for example, in combination with charges of murder, incitement,<sup>808</sup> and several charges in terms of the Firearms Control Act 60 of 2000.<sup>809</sup>

There is a substantial difference, however, between the wording of the Californian and South African sentence enhancements. Section 186.22(b)(1) of STEP holds that where someone

(...) is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members (...)

that person shall receive a sentence enhancement (as it is colloquially referred to). These enhancements shall vary depending on the underlying felony that the person

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<sup>807</sup> 186.22(b)(2) holds that

[i]f the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility, that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1).

<sup>808</sup> See *Thomas* 20-21.

<sup>809</sup> See *Thomas* 23-24 *et seq.*

has committed.<sup>810</sup> Two requirements therefore arise from the text of section 186.22(b)(1) and this has been confirmed through case law.<sup>811</sup> The first requirement is the crime must have been committed for the “benefit of, at the direction of, or in association with any criminal street gang”. This wording is therefore substantially similar to section 9(1)(a) of POCA. It would seem that that the South African Legislature opted to convert this sentence enhancement into a substantive offence; take the sentence enhancement and strip it of its constitutional protections that would prevent punishment of mere association.

The wording in section 186.22(b)(1) STEP is clear and uncontroversial. All that is required, is that the crime have some relation to gang activity<sup>812</sup> and not be for a personal purpose – which also relates to the second requirement. The accused must secondly also possess specific intent to either “promote, further, or assist” in any criminal conduct of the criminal street gang members. The Supreme Court of California

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<sup>810</sup> The enhancement shall be between two and four years as per the court’s discretion (in terms of section 186.22(b)(1)(A)). This shall however not apply if the felony for which the person is convicted is a serious felony. Serious felonies, in terms of section 1192.7(c) of the Californian Penal Code, include crimes such as murder or voluntary manslaughter, arson and several forms of assault with a deadly weapon. In those circumstances, he or she “shall be punished” by a further five years. In instances of violent felonies, the person shall be sentenced for an additional ten years in terms of section 186.22(b)(1)(B). Violent felonies mostly include similar crimes but are restrained to contact crimes and does not include reference to crimes such as arson.

<sup>811</sup> See generally BE Witkin, NL Epstein & members of the Witkin Legal Institute *Witkin California Criminal Law* 4 ed par 40.

<sup>812</sup> Both the wording of section 186.22(b)(1) and case law clearly indicate that a gang member may act alone or in concert with other gang members. In *People v. Galvez* 195 Cal.App.4th 1253 (2011) (“*Galvez*”) at 1261-1262 the Californian Second District Court of Appeal agreed with the State that an assault by a gang member of someone who was attempting to call 911 to report a gang-related crime satisfies the requirement of acting “in association with” a gang. This crime was furthermore committed in public and would send a clear warning message. An expert witness, Detective Corbett, stated that this public assault “promotes fear, which, in essence, promotes their gang and their brutality to the community in which they live.” He further stated that “[i]f you have a group of individuals ... that attack somebody and they’re together and they are with [a] gang, they are absolutely promoting fear in the furtherance of that gang in that community”. In *People v. Albillar* 51 C.4th 47 (2010) at 68 the Supreme Court of California held that there was substantial evidence for the jury to infer that the defendant had acted in concert with and assisted other gang members to commit several acts of rape.

made it clear in *People v. Albillar*<sup>813</sup> that gang *membership* is not required. There must rather just be the specific intent to promote, further or assist the criminal street gang.<sup>814</sup>

It will immediately be noted that the STEP enhancement differs from that contained in section 10(3) of POCA in that it does not enhance a sentence based merely on association or membership and that there are further objective requirements (the crime must be in association, at the direction or for the benefit of the gang) and subjective requirements (specific intent to further, assist or promote the gang's criminal conduct).

Section 10(3), conversely, does not require any of these elements and allows an individual convicted of any offence to be punished more severely *solely* based on gang membership. This type of scheme of punishment is constitutionally suspect and is punishing mere gang membership without any reference or connection to any type of gang activity. This shall be discussed in detail below.<sup>815</sup>

#### **4 5 3 4      *The possible role of restorative justice in gang-related cases***

The National Anti-Gang Strategy ("the Strategy") recognises restorative justice under its fourth pillar (the criminal justice process). This facilitates the *rehabilitation* of gang-offenders and the *reintegration* of these persons into their communities. Restorative justice in these cases can therefore potentially improve social cohesion between victims and offenders.<sup>816</sup> A restorative justice process should therefore be considered as an alternative or additional sentence in gang-related cases, even though it is not explicitly recognised in POCA.

Restorative justice processes usually stand in stark contrast to the usual functioning of the criminal justice system. The criminal justice system essentially revolves around

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<sup>813</sup> See fn 811 above.

<sup>814</sup> See *Albillar* 67-68. In *People v. Ramirez* 244 C.A.4th 800 (2016) at 819 the Court found that there was not sufficient evidence to hold that the accused had committed the attempted murder knowing that the persons that he had acted in concert with were gang members. He therefore could not have specific intent to further their activities. Also see BE Witkin, NL Epstein & members of the Witkin Legal Institute *Witkin California Criminal Law* 4 ed par 40.

<sup>815</sup> See 5 4 below.

<sup>816</sup> Western Cape Department of Community Safety "Implementing the National Anti-Gangsterism Strategy" (02-12-2017) <[https://www.westerncape.gov.za/assets/departments/community-safety/presentation\\_nags\\_workshop\\_gang\\_strategy.pdf](https://www.westerncape.gov.za/assets/departments/community-safety/presentation_nags_workshop_gang_strategy.pdf)> *Western Cape Government* (accessed 01-10-2017).

the accused and places the victim of the crime at the background; often invisible or passive throughout the process.<sup>817</sup> Roach states that

[d]iscursively, both punitive and non-punitive models of victims' rights promise to control crime and respect victims, but the punitive model focuses all of its energy on the criminal justice system and the administration of punishment while the non-punitive model branches out into other areas of social development and integration.<sup>818</sup>

Christie states it even more profoundly:

So, in a modern criminal trial, two important things have happened. First, the parties are being represented. Secondly, the one party that is *represented* by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing. She or he is a sort of double loser; first, *vis-à-vis* the offender, but secondly and often in a more crippling manner by being denied rights to full participation in what might have been one of the more important ritual encounters in life. The victim has lost the case to the state.<sup>819</sup>

Roach and Christie therefore make it clear that the modern criminal justice process has further victimised the victims of crime. The professionalisation of (legal) conflict has essentially dehumanised this process with the conflict becoming the “property” of legal professionals and the State.<sup>820</sup> Restorative justice allows victims to reclaim ownership of the justice process.

Although the definition of restorative justice has not always been readily susceptible to crystallisation,<sup>821</sup> certain widely-accepted principles and definitions have emerged.

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<sup>817</sup> See Department of Justice and Constitutional Development “Restorative justice: the road to healing” (2011) *the doj & cd* <<http://www.justice.gov.za/rj/2011rj-booklet-a5-eng.pdf>> (accessed 20-09-2017).

<sup>818</sup> K Roach “Four Models of the Criminal Process” (1999) 89(2) *Journal of Law and Criminology* 671 673. Also see SE van der Merwe “A basic introduction to criminal procedure” in JJ Joubert (ed) *Criminal Procedure Handbook* 12 ed (2017) 3 12-14.

<sup>819</sup> N Christie “Conflicts as Property” (1977) 17(1) *British Journal of Criminology* 1 3 (original emphasis).

<sup>820</sup> See Christie (1977) *British Journal of Criminology* 4; M Zernova *Restorative Justice: Ideals and Realities* (2007) 48.

<sup>821</sup> See A Skelton & M Batley “Restorative justice: a contemporary South African review” (2008) 21(3) *AC* 37 38 where the authors hold that there is “widespread agreement” on the definition of restorative justice and criticise Bezuidenhout’s view that there is no consensus regarding the definition and scope of restorative justice. See C Bezuidenhout “Restorative justice with an explicit rehabilitative ethos: is this the resolve to change criminality?” (2007) 20(2) *Acta Criminologica* 43 43-60.

The United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Justice Matters (“UN Basic Principles”),<sup>822</sup> which holds that a “restorative process”

means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.<sup>823</sup>

The Department of Justice and Constitutional Development expands on these ideas and specifies “victims, offenders, families, concerned and community members” all as stakeholders in the restorative process with the focus on repairing the harm that was inflicted upon the victim and not merely on retributive justice as the focus has been traditionally.<sup>824</sup>

Restorative justice may be invoked at several stages of the criminal process.<sup>825</sup> It may be done before the crime has been reported and is dealt with by the affected parties before the matter is escalated to the formal justice process. This may be more appropriate for petty crimes of a non-violent nature.<sup>826</sup>

The process may furthermore take place during the pre-trial stage (thus after a charge has been laid but before the formal court process) and the most prominent example is diversion under the Child Justice Act 75 of 2008 (“CJA”).

Skelton and Batley outline the process for the invocation of restorative justice during the pre-trial stage: A prosecutor identifies a case which has the potential for diversion whereupon the accused and the victim are informed of the process. The matter is kept on the court roll and postponed while the matter is referred to a “service provider” such as the Department of Social Development or a nongovernmental organisation for

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<sup>822</sup> ECOSOC Res. 2000/14 (21 July 1999) UN Doc No E/2000/INF/2/Add.2.

<sup>823</sup> UN Basic Principles Annex II par 1(3).

<sup>824</sup> Department of Justice and Constitutional Development “Restorative justice: the road to healing” *the doj & cd*.

<sup>825</sup> See Department of Justice and Constitutional Development “Restorative justice: the road to healing” *the doj & cd*.

<sup>826</sup> This seems to be the most popular application of the process (outside of diversion of youth offenders in terms of the CJA) – see H Hargovan “Knocking and entering: restorative justice arrives at the courts” (2008) 21(1) *Acta Criminologica: Special Edition* 24 26.



assessment. If the service provider agrees that the matter is appropriate for a restorative process, such processes may be initiated. Upon the postponed court date, the responsible prosecutor would submit a report to the court outlining the process.<sup>827</sup>

Restorative processes may also take place during the pre-sentencing (where certain conditions are set as part of suspended or postponed sentences) or post-sentencing stages (such as correctional programmes).<sup>828</sup> A convicted person who is considered for community correction,<sup>829</sup> may be required to partake in mediation between him/her and the victim or family group conferencing.<sup>830</sup> Family group conferencing<sup>831</sup> and victim-offender mediation<sup>832</sup> are diversion options in terms of the CJA. The rationale for victim-offender mediation under the latter Act is stated as a consensual process<sup>833</sup> which brings the alleged child-offender together with the victim of his or her alleged crime. These parties shall then, mutually, formulate a plan which aims to redress the impact and effects of the offence.<sup>834</sup>

The appropriateness of restorative justice in redressing all types of crimes may however be criticised. The SCA in *S v Thabethe* (“*Thabethe*”)<sup>835</sup> cautioned against the indiscriminate use of restorative processes. Bosiello JA further warned against its application in relation to serious offences as this might “evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society”.<sup>836</sup> Inappropriately resorting to restorative processes may discredit the entire criminal justice system. A sentence must always, as a general point of departure, represent

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<sup>827</sup> Skelton & Batley (2008) AC 43.

<sup>828</sup> Department of Justice and Constitutional Development “Restorative justice: the road to healing” *the doj & cd*.

<sup>829</sup> In terms of the Correctional Services Act 111 of 1998 (“CSA”), “community correction”

means all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department [.]

<sup>830</sup> Section 52(1)(g) of the CSA.

<sup>831</sup> Section 61 of the CJA.

<sup>832</sup> Section 62 of the CJA.

<sup>833</sup> Section 62(1)(b) of the CJA.

<sup>834</sup> Section 62(1)(a) of the CJA.

<sup>835</sup> 2011 (2) SACR 567 (SCA).

<sup>836</sup> *Thabethe* para 20.

some sort of equilibrium between the “seriousness of the offence and the natural indignation and outrage of the public”.<sup>837</sup>

Certain common themes arise from this brief overview. Restorative justice, at its core, is a consensual process which aims to involve all the stakeholders affected by a crime. The aim of the process is usually to redress harms caused, heal or restore relationships and identify the underlying rationale for the criminal behaviour.<sup>838</sup> Restorative justice must furthermore take place within the general framework of sentencing and always be cognizant of the seriousness of the offence and whether such a process is “appropriate” given the nature of the crime.

The influence of criminal gangs extends beyond the individual and affects communities at large as well, especially in communities like the Cape Flats. This has been illustrated in Chapter 2 of this dissertation. Community involvement in readdressing the harm caused by gang members could thus be extremely apposite in healing a community, especially a community plagued by gang activity. The gravity and seriousness of gang-related crime must however be borne in mind. They range from harmful initiation processes that remove a young boy from his home to that boy being used in murders for the gang.<sup>839</sup> Disruption of public services such as clinics, schools, and transport affect Cape Flats communities on a large scale. Streets in these areas are often the battleground for turf wars; claiming the lives of innocent children who are hit by stray bullets.

It would thus be advantageous, in the appropriate circumstances, to invoke restorative processes in order to heal victims of gang violence as well as communities at large. The Constitutional Court considered the appropriateness of restorative processes in a defamation case in *Dikoko v Mokhatla*.<sup>840</sup> Perhaps, as guiding principles in gang cases, reference can be made to Sachs J’s separate judgment in

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<sup>837</sup> *Thabethe* para 20. Also see S Terblanche *A Guide to Sentencing in South Africa* 3 ed (2016) par 11.6 where the author seems to doubt the potential widespread application of restorative justice unless there is an overhaul of the criminal justice system; accompanied by a shift from the “fixation” of the legislature on retributive justice.

<sup>838</sup> Department of Justice and Constitutional Development “Restorative justice: the road to healing” *the doj & cd*.

<sup>839</sup> See for example S Swingler “The Cape’s youth gangs: Bigger, deeper, more dangerous” (26-05-2014) *Daily Maverick* <[https://www.dailymaverick.co.za/article/2014-05-26-the-cape-youth-gangs-bigger-deeper-more-dangerous/#.Wg\\_mJ0qWaUm](https://www.dailymaverick.co.za/article/2014-05-26-the-cape-youth-gangs-bigger-deeper-more-dangerous/#.Wg_mJ0qWaUm)> (accessed 01-11-2017).

<sup>840</sup> 2006 (6) SA 235 (CC).

which he references Skelton,<sup>841</sup> who identifies four principles or elements of restorative justice. These principles are: encounter (dialogue or interaction addressing the harm caused and potential future resolution), participation (informal interaction between the victim and offender and other possible stakeholders close to the core parties), reintegration (back into the community in which the offender caused harm) and reparation (the goal being healing rather than retribution).

#### 4 6 Evaluation

From the preceding analysis in the sections above, it becomes apparent that the offences enumerated in POCA are statutory offences with nuanced differences compared to their common law counterparts. As mentioned above in Chapter 3 of this dissertation, the only difference in some instances between the corresponding common law crime and the POCA offence, is the fact that the penalty in terms of POCA would be less severe than in terms of the common law. The offences under POCA seem to add an additional layer of punishment to conduct which is patently covered by existing common and statutory laws. This could have also been achieved by a sentence enhancement similar to those contained in POCA section 10. Considering the main reason for the promulgation of POCA was to supplement the existing common and statutory law, it becomes concerning that the Chapter 4 crimes created by POCA do not, in fact, *create* anything meaningful. What POCA does “create”, are modified common law offences cloaked in statutory language. If POCA was promulgated due to the insufficient common law, then logically we must conclude that the POCA-offences are equally as ineffectual as their common law counterparts.

Sections 9(1)(b) and (c) are especially problematic; being statutory manifestations of common law offences. Section 9(1)(b) has qualities of common law assault as well as intimidation under the Intimidation Act. The only case law interpreting this offence however seems to disregard these parallels and abuses the broad statutory wording. The Court consequently resorts to the furthest extremes of inferential reasoning in order to attribute the requisite intention to the accused.

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<sup>841</sup> A Skelton *The Influence of the Theory and Practice of Restorative Justice in South Africa, with Special Reference to Child Justice* Unpublished LLD thesis Pretoria University (2006) 18-21.

Several of the provisions are also subject to certain interpretive issues while sections 9(1)(b) and 10(3) are constitutionally problematic. Judicial or legislative intervention is required to remedy the situation.

Gang convictions are at a shocking low rate. It has been reported that there have been only 61 gang convictions over the course of five years which translates into a conviction rate of approximately 3%.<sup>842</sup> During the period between the 1<sup>st</sup> of April 2016 and the 31<sup>st</sup> of July 2017, only 42 persons were convicted under POCA in the Western Cape from 3 892 gang-related arrests.<sup>843</sup> This translates into a 1,08% conviction rate over a sixteen-month period.

The underutilisation of POCA Chapter 4 may be ascribed to certain key factors. *Firstly*, prosecutors may choose to rely on familiar common law and statutory crimes when charging alleged gang members.<sup>844</sup> The technical complexities in securing a Chapter 4 conviction may be too laborious in contrast to familiar common law crimes. *Secondly*, the lack of evidence inherent in gang-related crimes (due to their clandestine nature) frustrates the prosecution thereof – either through the common law or statute.<sup>845</sup> These conviction rates are not solely attributable to POCA. Understaffed police stations<sup>846</sup> as well as the general backlog of the criminal justice system play a role.

The National Prosecuting Authority (“NPA”) should also promote education for prosecutors relating to the crimes enumerated under Chapter 4 of POCA. From a

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<sup>842</sup> S Sesant “Gang guilty verdicts at 3%” (28-03-2017) *IOL* <<http://www.iol.co.za/news/crime-courts/gang-guilty-verdicts-at-3-8378062>> (date accessed 24-06-2017).

<sup>843</sup> Portfolio Committee on Police “Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape” *Parliamentary Monitoring Group* (23-08-2017) <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170823Anti-Gangsterism.pdf>> (accessed 01-09-2017). Also see Portfolio Committee on Police “Hawks Illegal Firearms Unit; SAPS Anti-Gang Strategy; Quarter 1 performance; Vetting Senior Management” *Parliamentary Monitoring Group* (23-08-2017) <<https://pmg.org.za/committee-meeting/24881/>> (accessed 01-09-2017). Also see Chapter 1 1 above.

<sup>844</sup> No data was provided on exactly how many gang members (or persons who actively associate with a gang) were convicted under the common law or other statutory offences. The tables provided only indicate certain anecdotal incidences – which total twelve convictions. See Portfolio Committee on Police “Briefing by the Management of SAPS on the Anti-gang Strategy: Western Cape, KwaZulu-Natal and Eastern Cape” *Parliamentary Monitoring Group* 22-23

<sup>845</sup> See generally South African Law Reform Commission *Discussion Paper 92* (2000) 25.

<sup>846</sup> See Chapter 2 2 above.

review of the case law, the perception is that the NPA is only preoccupied with implementing POCA to deal with “white collar criminals”. The NPA however does offer an advanced training programme on organised crime, which, *inter alia*, deals the following aspects are dealt with: “[e]lements of Gang related [sic] Offences as identified in court judgments: the existence of a gang; Pattern of criminal gang activity; accused; the *actus reus*; *mens rea*”.<sup>847</sup> This however seems to be an optional course. It would be highly advantageous if this course were to be compulsory for prosecutors who work in areas with a high incidence of gang-related crimes.

It is at this point that one must consider the strategies by other jurisdictions employed in their fight against criminal gangs. The current statutory scheme, although a commendable project, has not had a substantial impact on the South African fight against criminal gang activities. The most significant case example has been the judgment in *Thomas* which has even garnered international accolades for the prosecutors.<sup>848</sup> This author is convinced that the same result would have been achieved (save for the convictions based on POCA Chapter 2) through the use of common law offences. Stated otherwise: Chapter 4 did not create legislative innovations which enabled the State to prosecute conduct that the State could previously not.<sup>849</sup> This preliminary verdict on the usefulness of POCA Chapter 4 begs the question: Should the focus not be on general principles – especially modes of liability, in order to more effectively prosecute those responsible for group-based criminal activities (such as criminal gang activities)? And, is POCA not ripe for

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<sup>847</sup> Justice College “Legal & Quasi-Judicial Learning Faculty: Prosecutorial Programmes” <<http://www.justice.gov.za/juscol/f-lqj-05.html#06>> Justice College (accessed 05-08-2017); Own italisation. Also see Parliamentary Monitoring Group “Question to the Minister of Justice and Correctional Services” (14-11-2016) *Parliamentary Monitoring Group* (accessed 05-08-2017).

<sup>848</sup> M de Wee “SA aanklaers wen prys met Geweld-saak” *Die Burger* (2016-09-16) 5. Also see D Plato “George “Geweld” Thomas and co-accused’s sentencing welcomed” <<https://www.westerncape.gov.za/news/george-%E2%80%9Cgeweld%E2%80%9D-thomas-and-co-accused%E2%80%99s-sentencing-welcomed>> (03-06-2015) *Western Cape Government* (accessed 09-09-2016) where the Western Cape Minister of Community Safety, Dan Plato, hailed the judgement and stated that it was “a victory for the communities plagued by gangs and drugs in the province”.

<sup>849</sup> Burchell also critiques the criminalisation of gang activities in general. The author asserts that anti-gang legislation presupposes that gangs share certain universal characteristics and suggests that the common law, especially the inherently flexible common purpose doctrine, might be more apposite to deal with the phenomenon. This might not be an issue so much with POCA as it would appear the definitions are broad and discretionary. See Burchell *Principles* 909-910.

legislative reform, given the rather negative evaluation apparent from this chapter? What is clear is that POCA as it currently stands does not seem to add a significant value in terms of the fight against criminal gangs in South Africa. Subsequent chapters will further explore the possibilities for law reform, not only in terms of the analyses thus far, but also in terms of certain constitutional imperatives.

## Chapter 5

# Constitutional aspects relating to Chapters 1 and 4 of the Prevention of Organised Crime Act 121 of 1998

### 5 1 Introduction

In a constitutional democracy like South Africa, it is imperative to evaluate a statute such as POCA through the lens of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). This Chapter considers of three individual yet interrelated components. The first component is the constitutional duty on the State to protect its inhabitants, which stands in a dichotomous relationship to the other components: the fair trial rights of the accused in terms of section 35(5) of the Constitution (which is largely the focus of the Chapter) and their freedom of association in terms of section 18 of the Constitution.

Before a constitutional analysis can be done, a basic normative constitutional framework must be established. Section 1 of the Constitution establishes South Africa as a sovereign and democratic state founded on several values, including the rule of law. The principle of legality, which is encompassed by the rule of law, is a core principle of criminal justice and thus naturally important to this study. Chapters 1 and 4 of POCA are also subject to section 2 of the Constitution which establishes the Constitution as the supreme law of the country and that “law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. The Bill of Rights moreover reaffirms “the democratic values of human dignity, equality and freedom”.<sup>850</sup> It will be shown below that these underlying values recur throughout the constitutional analysis in the formation and development of certain evidentiary and criminal law rules and that it is of paramount importance that they be protected and promoted.

South Africa has several obligations in terms of and relating to international law as well as regional instruments. These obligations must be contextualised through our Constitutional framework. The Constitution *compels* all courts, tribunals and forums to

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<sup>850</sup> Sections 1 and 7 of the Constitution.



consider international law when interpreting the Bill of Rights.<sup>851</sup> This obligation does not extend to foreign law as any court “may” consider foreign law<sup>852</sup> and to the text does not refer the word “must” as with international law. Section 39(2) furthermore instructs courts, in the interpretation of legislation as well as the development of the common law and customary law, to promote “the spirit, purport and objects of the Bill of Rights”.

The Constitutional Court (under the Interim Constitution, 1993) in *S v Makwanyane and Another* (“*Makwanyane*”)<sup>853</sup> however noted that although there is a duty to consider international law, a court is not obliged to follow it.<sup>854</sup> Similarly, section 233 of the Constitution, 1996 states that courts must favour a reasonable interpretation of legislation to be consistent with international law rather than alternative inconsistent interpretations. This section, *prima facie*, does not apply to the common law and appears to only apply to the interpretation of legislation.

Dugard highlights the willingness of South African courts to rely on international human rights law and refers to reliance on treaties as an interpretative tool as well as “to support an interpretation in favour of the unconstitutionality of a statute”.<sup>855</sup> This position is strongly affirmed by *Glenister v President of the Republic of South Africa and Others* (“*Glenister*”).<sup>856</sup> The Constitutional Court held that

(...) section 233 (...) demands any reasonable interpretation that is consistent with international law when legislation is interpreted. There is, thus, no escape from the manifest constitutional injunction to integrate, in a way the Constitution permits, international law obligations into our domestic law. We do so willingly and in compliance with our constitutional duty.<sup>857</sup>

The peremptory language of section 233 is therefore bolstered by the resolute interpretive instruction by the Constitutional Court.

Further, section 198(c) of the Constitution states that national security must be perused with regard to international law. It is submitted here that matters such as

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<sup>851</sup> Section 39(1)(b).

<sup>852</sup> Section 39(1)(c).

<sup>853</sup> 1995 (3) SA 391.

<sup>854</sup> *Makwanyane* at 415.

<sup>855</sup> J Dugard *International Law: A South African Perspective* 4 ed (2012) 63-64.

<sup>856</sup> 2011 (3) SA 347 (CC).

<sup>857</sup> *Glenister* para 202.

criminal gang activity must indeed be treated as a matter of national security, as criminal gang activity has been repeatedly identified as threatening the security of the Republic and has undergone a transmutation to having, in certain instances, being linked to (and having the structure of) international syndicates. In his study on the influence of serious crime as a national security threat since 1994, Pienaar found that serious crime in fact posed a significant threat to the national security of the state.<sup>858</sup> This is due to a matrix of factors, especially the governmental failure to prevent transnational organised crime (which was also a rationale for the promulgation of POCA);<sup>859</sup> the proliferation of corruption as well as high instances of physical violence.<sup>860</sup> The author also found that, despite the State's acknowledgement and attempts to address these issues, there was ineffectual mitigation of the threats – especially due to a lack of policy implementation.<sup>861</sup>

Section 231 of the Constitution provides rules for the domestication and implementation of international agreements. Section 231(2) importantly states that an agreement is only binding on the Republic where such an agreement has been approved by the National Assembly as well as the National Council of Provinces (save for instances in section 231(3)). An agreement however only becomes law when it has been enacted through national legislation.<sup>862</sup> The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 ("ICC Act"), for example, gives effect to the Rome Statute of the International Criminal Court ("the Rome Statute").<sup>863</sup> POCA, amongst other pieces of national legislation, gives effect to the United Nations Convention Against Transnational Organized Crime ("the Palermo Convention").<sup>864</sup>

It has been noted above and will be noted again below that POCA in fact predates the Palermo Convention. Therefore, it is somewhat of a misnomer to state that POCA is a classic act of incorporation or transformation of an international instrument.

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<sup>858</sup> LE Pienaar *Serious Crime as a National Security Threat in South Africa since 1994* DPhil thesis (Political Science) University of Pretoria (2014) 205-210.

<sup>859</sup> See Chapter 1 (generally) as well as Chapter 4 2 above.

<sup>860</sup> Pienaar *National Security Threat* 206.

<sup>861</sup> Pienaar *National Security Threat* 211-212.

<sup>862</sup> In terms of section 231(4). This section also states that a self-executing provision of an international agreement does not have to be enacted through legislation but only requires Parliamentary approval, unless that provision is inconsistent with the Constitution.

<sup>863</sup> Adopted 17 July 1998 (entered into force 1 July 2002) 2187 UNTS 90.

<sup>864</sup> Adopted 14 December 2000, (entered into force 20 February 2004) 40 ILM 335.

However, given the purport and subject matter of POCA, it is still the case that POCA “gives effect to” the stated aims of the Palermo Convention. POCA overwhelmingly fulfil its obligations pertaining to the “[c]riminalization of participation in an organized criminal group”.<sup>865</sup> On the other hand, a deviation from the Palermo Convention can be noted with regard to the definition of “serious crime” as per article 2(b) of POCA.<sup>866</sup> It is submitted that this deviation does not in any fundamental way undermine POCA’s broad compliance with the spirit and aims of the Palermo Convention.

A constitutional dichotomy arises in order to realise these constitutional and international law obligations imposed on the State. In pursuance of the obligation to protect the freedom and security of all of the inhabitants of the state, the liberty and dignity of those committing crimes necessarily have to be limited (as will be shown below) to both punish crime and protect the general populace in the future. Sachs J observed the following in *S v Coetzee* (“*Coetzee*”)<sup>867</sup>

There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.<sup>868</sup>

Before the aforementioned liberties are (justifiably) infringed upon, an accused has to be found guilty of a crime through a trial. As alluded to above, that trial has to be *fair*. The State, legislature and courts are in a position of authority over an accused and necessarily certain principles have developed in order to limit the powers of the three branches of government in order to protect inhabitants from arbitrary and unfair law enforcement.

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<sup>865</sup> Article 5 of the Palermo Convention.

<sup>866</sup> See the discussion at 4 3 2 above.

<sup>867</sup> 1997 (3) SA 527.

<sup>868</sup> *Coetzee* para 220 (footnotes omitted).

The constitutional challenges to the relevant pieces of foreign legislation will be analysed as a comparative tool. It is essential to analyse the parent legislation of POCA Chapter 4, the Street Terrorism Enforcement and Prevention Act of 1988 (“STEP”). The US state of Tennessee will also be referred to in the discussion of freedom of association. The Canadian Criminal Code RSC 1985, c C-46 (“the Code”) further serves as an important analytical tool, considering the similarities between our constitutional texts and the Constitutional Court’s frequent reliance on Canadian jurisprudence. Comparable international instruments, lastly, shall also be referenced throughout the Chapter.

## 5 2 The constitutional duty of the State to protect its inhabitants

The Preamble to POCA illuminates the State’s motivation for promulgating the Act. It explicitly cites the infringement on the rights of the inhabitants and communities of South Africa through organised crime, money laundering and criminal gang activities as one of the main motivations for the promulgation of the Act.<sup>869</sup> Section 12(1)(c) is especially relevant when one reads the next two paragraphs of the Preamble, which states that<sup>870</sup>

(...) it is the right of every person to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals (...)

and further that

(...) organised crime, money laundering and criminal gang activities, both individually and collectively, present a danger to public order and safety and economic stability, and have the potential to inflict social damage [.]

An ambitious promise is made in section 12(1)(c) of the Constitution, stating that “[e]veryone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources”. This

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<sup>869</sup> See *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (4) SA 843 (CC) at paras 14-15; *Mohunram and Another v NDPP and Another (Law Review Project as Amicus Curiae)* 2007 (2) SACR 145 (CC) at para 144 as well as Chapter 1 above.

<sup>870</sup> Also see Cowling (1998) *South African Journal of Criminal Justice* 355.

creates both a positive as well as a negative duty on the State.<sup>871</sup> This duty, in its negative form, requires the State to refrain from all forms of violence and tyranny against its inhabitants. In its positive form, however, the State is required to act proactively and implement measures to prevent violence against its inhabitants and thus protect them.<sup>872</sup> Although the State seems to be upholding the negative form of this constitutional duty, it is lacking in the positive form. It is clear from the contextual background provided in Chapter 1 that South Africa and especially the Western Cape are still terrorised by criminal gang activities, which have even *increased* since the inception of the Constitution and POCA before the turn of the millennium.<sup>873</sup>

As mentioned above, section 12(1)(c) provides an ambitious and broad constitutional promise. There have been several seminal cases that have interpreted this right. In *Christian Education South Africa v Minister of Education* (“*Christian Education*”)<sup>874</sup> the Constitutional Court emphasised the State’s role and responsibility in promoting the right to safety and security of its inhabitants. Sachs J noted that section 12 must be read in conjunction with section 7 of the Constitution, which places an obligation on the State to “respect, protect, promote and fulfil” the rights contained in the Bill of Rights.<sup>875</sup> Section 7 thus reinforces the notion of a positive obligation. This however still does not provide an answer as to how exactly the State is supposed to fulfil this obligation. This issue was more pertinently addressed in *Carmichele v Minister of Safety and Security* (“*Carmichele*”).<sup>876</sup> Here, the Constitutional Court considered the scope and content of the positive obligation. Ackerman and Goldstone JJ refer to section 8(1) of the Constitution which states that the Bill of Rights is applicable to all law as well as all three branches of government and organs of State.<sup>877</sup>

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<sup>871</sup> I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 281. Also see GP Kemp, S Walker, R Palmer, D Baqwa, C Gevers, A Steynberg *Criminal Law in South Africa* 2 ed (2015) 10. Here, the authors argue that modern societies expect more from a state than the mere maintenance of law and order. Rights described here (amongst many others), such as safety and security, should actively be pursued and promoted through the State and its various organs.

<sup>872</sup> Currie & De Waal *Handbook* 281-282.

<sup>873</sup> See Chapter 1 1 above.

<sup>874</sup> 2000 (4) SA 757 (CC).

<sup>875</sup> *Christian Education* 47.

<sup>876</sup> 2001 (4) SA 938 (CC).

<sup>877</sup> *Carmichele* 44. The justices also refer to section 7(1) of the Interim Constitution which provided for a similar but narrower constitutional order. The original section (oddly) did not bind the judiciary to the Bill of Rights and did not explicitly state that it was applicable to all law.

The justices further state that this constitutional order prohibits the aforementioned organs and branches of government from infringing on the rights of its citizens and in some instances also creates a positive duty to “provide appropriate protection to everyone through laws and structures designed to afford such protection”.<sup>878</sup> This notion is also bolstered by article 6(1) of the International Covenant on Civil and Political Rights (“ICCPR”)<sup>879</sup> that aims to bind its signatories to protect the right to life of their inhabitants and that that right must be protected through law and the inhabitants shall also not be arbitrarily be deprived of it.<sup>880</sup> In a comparative analysis, the Court points out that article 2(1)<sup>881</sup> of the European Convention on Human Rights (“ECHR”)<sup>882</sup> corresponds with the right to life<sup>883</sup> contained in the South African Constitution. Furthermore, the Court applies the dictum of a European Court of Human Rights judgment in *Osman v United Kingdom* (“*Osman*”).<sup>884</sup> This judgment supports the notion that the right to life is not a “bare” or freestanding right. There must also be “machinery” in order to enforce that right:

It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that art 2 of the Convention may also imply in certain well defined circumstances a positive

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<sup>878</sup> *Carmichele* 44.

<sup>879</sup> Adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.

<sup>880</sup> Article 6(2) does however limit this right by acknowledging that states, that have not abolished the death penalty, may implement it as a criminal sanction.

<sup>881</sup> Article 2(1) reads that

[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

<sup>882</sup> (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221.

<sup>883</sup> In terms of section 11 of the Constitution.

<sup>884</sup> 29 EHHR 245.

obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.<sup>885</sup>

One can therefore posit that the right to freedom and security of the person is the machinery or mechanism through which our right to life is realised and protected. And most importantly, it is the duty of the State to take action to protect its citizens, or at least provide mechanisms to do so. As noted in *Osman*, this can be achieved by effective criminal law sanctions (in order to deter violence and criminal activities) and action by the necessary law enforcement agencies.

Chapter 4 of POCA does not appear to be effective machinery to protect people from criminal gang activities. It is not submitted here that the State could eradicate *all* criminal gang activities, but currently there is an increase in this type of crime – implying a failure by the State in fulfilling its constitutional duty.

On the other side of the constitutional spectrum are the rights of the accused – which is the focus of this chapter. POCA has created harsh punishments for gang members. In addition to the original sentences for their underlying predicate crimes, criminal gang members or those who actively participate in criminal gang activities can be punished even further when these crimes constitute a pattern of criminal gang activities and commit one or more of the offences listed in Chapter 4. Persons may be liable in terms of Chapter 4 even if they did not commit a gang-related offence. In terms of section 10(3), a court may use the fact that the accused is a gang member as an aggravating circumstance for sentencing purposes. The fact that a section 9 offence has been committed 500 metres from a public or private school or other educational institution (during their operating hours), will constitute an aggravating circumstance.<sup>886</sup> These extreme measures are arguably justified due to the extraordinary gang presence in especially the Western Cape.<sup>887</sup> These extreme measures have to be balanced against the fair trial rights of accused persons in terms

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<sup>885</sup> *Osman* 115. The Constitutional Court also contrasted this position of the EU with the USA. In *De Shaney v Winnebago County Department of Social Services* 489 US 189 (1988) the Supreme Court of the United States refused to impose liability (based on a due process argument in terms of the 14th Amendment) on a governmental official due to the fact that there was a so-called “inaction” on the part of the official, in thus failing to prevent harm. See *Carmichele* para 45.

<sup>886</sup> Section 10(3) of POCA.

<sup>887</sup> *A Standing Organised crime: a study from the Cape Flats* (2006) 5.



of section 35(3) of the Constitution as well as section 12(1)(a), which protects citizens against arbitrary deprivation of freedom.

### 5 3 Fair trial rights under section 35(3) of the Constitution

Considerable attention has been paid to the rights of accused, arrested and detained persons since the advent of South Africa's constitutional democracy. This is evident from the introduction of several constitutional rights afforded to this class of persons in terms of section 35 of the Constitution. Section 35(3) specifically grants every accused person several fair trial rights due to the "punitive" or 'criminal' nature of the proceedings<sup>888</sup> and the potential deprivation of freedoms. Tulkens accurately states that it is in fact "[t]he primary, traditional role of human rights (...) to afford protection from the criminal law".<sup>889</sup> It reflects and expands upon the rights contained in international instruments such as the ICCPR,<sup>890</sup> the African Charter on Human and Peoples' Rights ("ACHPR")<sup>891</sup> as well as the ECHR.<sup>892</sup> The listed rights in section 35(3) do not form a *numerus clausus* of fair trial rights but extend into the sphere of a broader residual right<sup>893</sup> and attempt to promote the "abstract notions of fairness and justice".<sup>894</sup> This is a stark departure from and rejection of the draconian position under the apartheid regime. The Appellate Division in *S v Rudman; S v Mthwana* ("*Rudman*")<sup>895</sup> held that it

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<sup>888</sup> JM Burchell *Principles of Criminal Law* 5 ed (2016) 3.

<sup>889</sup> F Tulkens "The Paradoxical Relationship between Criminal Law and Human Rights" (2011) 9 *Journal of International Criminal Justice* 577 579.

<sup>890</sup> Article 14.

<sup>891</sup> (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217. See Article 7.,

<sup>892</sup> Article 6.

<sup>893</sup> See *S v Zuma* 1995 (4) BCLR 401 (CC) para 16. The Constitutional Court analysed the equivalent right under the Interim Constitution. The Constitutional Court in *S v Dzukuda and Others; S v Tshilo* 2000 (2) SACR 443 (CC) ("*Dzukuda*") at para 9 also states that instances listed in section 35(3) are merely that – instances – and that the right to a fair trial only becomes illuminated through adjudication and determination on a case-by-case basis. Also see generally SE van der Merwe & PJ Schwikkard *Principles of Evidence* (2016) 241-242 on trial fairness.

<sup>894</sup> *S v Ramuongiwa* 1997 (2) BCLR 268 (V). See F Snyckers & J Le Roux "Criminal Procedure: Rights of Arrested, Detained and Accused Persons" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 07-06) 51-100.

<sup>895</sup> (1992) 3 All SA 806 (AD).

(...) does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with 'the ideas underlying . . . the concept of justice which are the basis of all civilised systems of criminal administration'. The enquiry is whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted.<sup>896</sup>

And further:

What an accused person is entitled to is a trial initiated and conducted in accordance with those formalities, rules and principles of procedure which the law requires. He is not entitled to a trial which is fair when tested against abstract notions of fairness and justice.<sup>897</sup>

Several constitutionally suspect issues arise from Chapters 1 and 4 of POCA and can be divided into two broad categories. The first contentious issue is whether the use of prior convictions as predicate crimes violates any fair trial rights and secondly whether the scope of certain core definitions in Chapter 1 are, in the light of the constitutionally-enshrined principle of legality, offensive in terms of the aforementioned rights.

### 5 3 1 *The use of prior convictions*

POCA, both in Chapters 2 and 4, make use of previous convictions in constructing the elements of a pattern of racketeering activity and a pattern of criminal gang activity respectively. These patterns form the basis for the substantive crimes. This practice is constitutionally suspect and stands in stark contrast with contemporary South African criminal law as well as the law of evidence. The relevant provisions of the anti-racketeering law have already been subjected to constitutional challenge.<sup>898</sup> The following sections will provide a comprehensive exposition of the background and current position relating to treatment of evidence of prior convictions and investigate whether it can be constitutionally and doctrinally justified.

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<sup>896</sup> *Rudman* at 811.

<sup>897</sup> *Rudman* at 823.

<sup>898</sup> See *Savoi and Others v National Director of Public Prosecutions and Another* [2013] 3 All SA 548 (KZP) ("*Savoi I*") and *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC) ("*Savoi II*").

In terms of the South African law of evidence, under the common law, proof of an accused person's previous convictions is usually considered irrelevant and consequently inadmissible at the trial stage. It is however relevant and may be taken into account at the sentencing stage after an accused has been convicted<sup>899</sup> as well as when considering an application for bail.<sup>900</sup> The Criminal Procedure Act ("the CPA") furthermore creates certain exceptions to the aforementioned common law rule and enables the prosecution to rely on previous convictions as elements of a separate offence and in other limited statutory instances. In 1998, POCA also substantially broadened the ambit of the CPA with regards to the rules relating to previous convictions and other traditionally inadmissible categories of evidence.<sup>901</sup> The admission of otherwise prior convictions, falling under the broad category of similar fact evidence, must however be assessed in order to determine whether it is fair to an accused to be subjected to the use of previous convictions where other accused persons would, to a certain extent, be shielded against their use.

The following section will firstly analyse the motivation behind the rule against the use of prior convictions in criminal trials and secondly analyse the various exceptions to this rule. It will be determined whether this rationale has evolved over time and whether it still deserves a place in our law and if the underlying rationale is applicable to the situations under POCA.<sup>902</sup> It will then be discussed as to whether the inclusion of this exception is contrary to the fair trial rights of an accused, especially in the light of Chapter 4 of POCA.

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<sup>899</sup> In terms of section 271 (as well as sections 272 and 273) of the CPA.

<sup>900</sup> An application for bail is not considered a "criminal proceeding" in terms of the CPA. Howard J in *S v Hlongwa* 1979 (4) SA 112 (D) at 114-115 came to the conclusion that it was the clear intent of the Legislature to *not* include the bail applications under the scope of criminal proceedings because the Legislature had drawn a clear distinction between normal criminal proceedings under the CPA and bail applications in terms of sections 67 and 68. In fact, sections 60(11B)(a) and (b) compels an accused and their legal adviser to inform the court of prior convictions; to inform the court of any charges pending against the accused and whether the accused has been released on bail in with regards to those charges.

<sup>901</sup> Especially in terms of section 2(2).

<sup>902</sup> It must be borne in mind that the aim of this section is not to provide a comprehensive study of similar fact evidence or to suggest how this category of evidence should be dealt with regards to Chapter 4 of POCA.

The text of section 2(2) of POCA, which empowers the use of prior convictions in racketeering cases, reads as follow

The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

It is somewhat odd (and puzzling) that a similar provision to section 2(2) is not incorporated in reference to criminal gang activities. Section 2(2) exclusively applies racketeering offences. This may potentially only be an oversight, but it seems to be assumed that the same proviso would apply to Chapter 4.<sup>903</sup>

### **5 3 1 1      *Rationale for the rule***

Evidence of previous convictions is legally irrelevant for the purposes of criminal proceedings. The rationale behind this rule is the fact that admission of previous convictions has the potential to create a negative impact on the character of the accused.<sup>904</sup> The Court in *R v Dominic*<sup>905</sup> came to the conclusion that admitting the previous convictions of the accused into evidence prejudiced the trial court against the accused. The Court pointed out that the admission of such evidence undermines the objectivity of judicial officers by unfairly influencing their opinion of the accused through the lens of their prior convictions.<sup>906</sup> The exclusion of previous convictions thus facilitates judicial objectivity. It has to be determined if this underlying rationale may, constitutionally, prohibit the functioning of POCA Chapter 4.

### **5 3 1 2      *Origins of the rule: The position under the common law***

The origins of the similar fact rule can be found in English common law. It appears that there was no *general* principle against the use of an accused's previous convictions during a trial until the late 19<sup>th</sup> century.<sup>907</sup> There was only a piecemeal

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<sup>903</sup> See 4 4 4, 5 1 3 3 below as well as 7 2.

<sup>904</sup> *Savoi* 117

<sup>905</sup> (1913) TPD 582.

<sup>906</sup> *Dominic* 584.

<sup>907</sup> J Stone "The Rule of Exclusion of Similar Fact Evidence: England" (1933) 46(6) *Harvard Law Review* 954 960-961.

recognition of certain types of cases before then which acknowledged the fact that the evidence of previous misconduct of an accused should not be allowed in a separate, unrelated trial.<sup>908</sup> Julius Stone refers to what seems to be the first manifestation of the rule (already mentioned in the 18<sup>th</sup> century)<sup>909</sup> in treason trials but this “rule” was still misinterpreted by courts.<sup>910</sup> The rationale for this rule was the perceived unfairness for accused in defending prior acts that he or she was not indicted for in the present case and thus not prepared to defend at trial.<sup>911</sup> Foster, also speaking of a rule, asserted that the foundation for disallowing all evidence “foreign to the point in issue” is founded in “sound sense and common justice”.<sup>912</sup> This broad rule appeared to only exclude unrelated evidence which was “foreign to the point in issue” and evidence of relevant prior conduct would still be admissible.<sup>913</sup>

The first case to mention a general rule against the use of similar fact evidence<sup>914</sup> in *all* criminal proceedings appears to be *The King v John Carey Cole* (“Cole”).<sup>915</sup> This case concerns a man that was charged with the crime of sodomy. The accused was confronted with a confession to other acts of sodomy where he stated that these acts were his “natural inclination”.<sup>916</sup> Although Cole was charged on three separate indictments of sodomy, this confession, relating to the third instance, was used to

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<sup>908</sup> Stone (1933) *Harvard Law Review* 958.

<sup>909</sup> By Foster in 1762.

<sup>910</sup> Stone (1933) *Harvard Law Review* 958.

<sup>911</sup> M Foster *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surrey and of Other Crown Cases: To which are Added Discourses Upon a Few Branches of the Crown Law* (1809) (commonly referred to as “Foster’s Law”) 244-246. The author elucidates the rule to mean that

[t]he sense of this clause I take to be, that no overt act amounting to a distinct independent charge, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it amounteth - to a direct proof of any of the overt acts which are laid, it may be given in evidence of such overt acts.

<sup>912</sup> Foster’s Law 246.

<sup>913</sup> Stone (1933) *Harvard Law Review* 959. This is also clear from the examples that Foster gave of evidence that was allowed in treason cases that were still relevant according the courts.

<sup>914</sup> It must be noted that the broader category of similar fact evidence encompasses the category of prior convictions and the latter may be led as evidence under the exceptions pertaining to the former.

<sup>915</sup> (1810) Judges’ Notebooks on Crown Cases, Vol. 3.

<sup>916</sup> DJ Field *A Statutory Formula for The Admission of Similar Fact Evidence against a Criminal Accused* DPhil thesis (Law) Bond University (2013) 39 fn 118.

convict him on two of these indictments. His conviction was nevertheless overturned on appeal because it was not permissible for the Crown to show that “prisoner has a general disposition to commit the same kind of offense as that charged against him”.<sup>917</sup> This account of *Cole* only surfaced in 1814 when Phillips used it as authority for a rule prohibiting inclusion of evidence of previous similar facts or evidence that the accused had a tendency to commit a particular type of crime.<sup>918</sup> Other legal scholars however made no reference to such a rule – even as late as 1824.<sup>919</sup> Although the Court in *Cole* confidently expressed this rule prohibiting the reference to prior convictions due to its inherent unfairness, there was no widespread application of this rule.<sup>920</sup> The *Cole* judgment appeared to apply only in scenarios where the similar fact evidence would only serve as to prove that the accused had a particular *propensity* to commit a particular type of crime.<sup>921</sup>

This rationale, although not universally adopted, came to prominence in the infamous judgment of *Makin v Attorney General for New South Wales* (“*Makin*”).<sup>922</sup> The *Makin* judgment provided some clarity with regards to the inclusion of *similar fact evidence* during a separate criminal trial. The facts of the case deserve brief mention.<sup>923</sup> A married couple were in the business of so-called baby farming – a practice where they received payment to take care of babies of others who were not capable of doing so. The specific child in question had been found buried and decomposed in the backyard of the spouses.<sup>924</sup> They were then charged with the murder of that child. Upon further investigation, it was discovered that the bodies of twelve other children were buried in the backyard of the accused couple and this

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<sup>917</sup> Field *A Statutory Formula* (2013) 39 fn 118.

<sup>918</sup> Stone (1933) *Harvard Law Review* 959, referring to SM Phillips *Treatise on the Law of Evidence* 1 ed (1814) 69-70. Stone mentions that Phillips also refers to *Rex v Whiley* 2 Leach C. C. 983 (1804). In that case however, evidence of prior instances of forgery was used against the accused.

<sup>919</sup> Stone (1933) *Harvard Law Review* 960.

<sup>920</sup> Stone (1933) *Harvard Law Review* 961.

<sup>921</sup> Stone (1933) *Harvard Law Review* 965-966.

<sup>922</sup> 1894 AC 57 (PC).

<sup>923</sup> The facts of the case appear from the court *a quo* judgement of *R v Makin and Wife* 1893 (1) 11 N.S.W. L.R. 218 (“*Makin and Wife*”).

<sup>924</sup> *Makin and Wife* 1.

evidence was used in the criminal trial against them.<sup>925</sup> This judgment gave rise to the oft-quoted *dictum* of Lord Herschel:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

Paizes posits that there are two “distinct propositions” to be derived from Lord Herschel’s dictum.<sup>926</sup> Similar fact evidence may firstly not be used as the foundation of proving the guilt of the accused by showing that he or she has the propensity to commit certain types of crimes.<sup>927</sup> This first proposition is however qualified by the second: similar fact evidence may be adduced if its foundation is something other than to prove propensity.<sup>928</sup> The first proposition alludes to the original rationale to the rule, whereby it would be contrary to natural justice to expect the accused to answer to all of the misdeeds that he or she has done in his or life instead only responding to the

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<sup>925</sup> *Makin and Wife* 1.

<sup>926</sup> Paizes “Evidence” in E Du Toit & SE Van der Merwe *Commentary on the Criminal Procedure Act* vol 2 (RS 53 2014) 24-22D. Also see PJ Schwikkard & SE Van der Merwe *Principles of Evidence* 4 ed (2016) 78.

<sup>927</sup> Paizes “Evidence” in E Du Toit & SE Van der Merwe *Commentary on the Criminal Procedure Act* vol 2 (RS 53 2014) 24-22D.

<sup>928</sup> Paizes “Evidence” in E Du Toit & SE Van der Merwe *Commentary on the Criminal Procedure Act* vol 2 (RS 53 2014) 24-22D. DT Zeffertt “Similar-Fact Evidence in Criminal Proceedings” (1977) 94 *South African Law Journal* 399 402 points out that the evidence in *Makin* was not admitted because the accused was a “bad man” but rather that the similar fact evidence pointed towards the “strong statistical likelihood” that the buried babies had been murdered and that they had been murdered by the Makins. The author also refers to two other cases where the evidence rather pointed towards the statistical likelihood that the accused person had been the perpetrator. In *R v Smith* (1915) 84 LKJB 2153 (“*Smith*”) the accused had been charged with the murder of his “wife”. It was discovered that his previous two “wives” had also died in a similar fashion – in the bath. In *R v Geering* (1849) 18 LJMC 215 (“*Geering*”) the accused had been the common factor in deaths in her family resulting from food poisoned by arsenic in a short period of time.



relevant crimes charged and it also prohibits evidence that only shows that the accused is a “bad man”.<sup>929</sup> Van der Merwe and Schwikkard however point out that this formulation and rationale cannot justify the exclusion of propensity evidence in all circumstances. To illustrate this point, the authors refer to the judgment in *S v Straffen* (“*Straffen*”)<sup>930</sup> where evidence of the idiosyncratic propensity of the accused was allowed on the synthetic basis that it was relevant to the identity of the perpetrator (and not on the basis of propensity).<sup>931</sup> The *Makin* decision was understood to delineate certain categories of instances when similar fact evidence would be admissible evidence.<sup>932</sup> The conclusion that flows from that reasoning is that evidence outside of these categories is impermissible.<sup>933</sup> Categories include identity, design or system, intent and proving the *actus reus*.<sup>934</sup>

In *DPP v Boardman* (“*Boardman*”)<sup>935</sup> the principle underlying *Makin* was understood to mean that only similar fact evidence where the probative value outweighed the prejudicial effect may be admitted.<sup>936</sup> The Court in *Boardman* also required a “striking similarity” between the facts in question and the similar fact evidence.<sup>937</sup> This requirement was however rejected by the Court in *DPP v P*.<sup>938</sup> In *DPP v P*, the Court held that the inclusion of similar fact evidence cannot be restricted to instances of “striking similarity” but must be broadened to instances where the probative force outweighs the prejudicial impact and that may certainly *include* cases of striking similarity.<sup>939</sup>

It can be summarised that similar fact evidence, under the English common law, may not be admitted as a weapon of character assault against the accused but may be admitted in a circumspect fashion and in exceptional circumstances where there is

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<sup>929</sup> DT Zeffertt “Similar-Fact Evidence in Criminal Proceedings” (1977) 94 *South African Law Journal* 399 401.

<sup>930</sup> 1952 2 QB 911.

<sup>931</sup> PJ Schwikkard & SE Van der Merwe *Principles* 79-80.

<sup>932</sup> See Van der Merwe & Schwikkard *Principles* 81.

<sup>933</sup> Zeffertt (1977) *South African Law Journal* 401.

<sup>934</sup> See DT Zeffertt & AP Paizes *The South African Law of Evidence* 3 ed (2017) 298-314 for a comprehensive discussion on the main categories as elucidated by case law.

<sup>935</sup> [1975] AC 421.

<sup>936</sup> Schwikkard & Van der Merwe *Principles* 81-82 (referring to *Boardman* at 442, 451, 456 and 457).

<sup>937</sup> *Boardman* 444.

<sup>938</sup> [1991] 2 AC 447.

<sup>939</sup> *DPP v P* at 460-461. The Court also refers to *Straffen* and *Smith* here.

a “strong degree of probative force”<sup>940</sup> and has “material bearing on the issue to be decided”.<sup>941</sup> The courts, according to Zeffertt and Paizes, have identified that the overriding interest to be protected when allowing similar fact evidence and consequently evidence of prior convictions, is that it does not render the trial unfair.<sup>942</sup>

### **5 3 1 3      *Statutory exceptions to the rule***

The common law position relating to similar fact evidence and consequently evidence of prior convictions is entrenched in the South African law of evidence.<sup>943</sup> The evidence must be of material interest to the issue before the court or it must serve as proof or rebuttal of matter in dispute. Evidence of previous convictions of an accused is classified as similar fact evidence and is excluded because of the prejudicial effect of the evidence will exceed the probative value thereof. Proof of previous convictions must thus have an additional evidentiary value than to expose the bad character of the accused. There are however certain express statutory exceptions to the rule against similar fact evidence, which will be explored below.

#### **5 3 1 3 1      *The Criminal Procedure Act***

In terms of section 89 of the CPA, no charge may contain an allegation that an accused possesses a prior conviction unless it is an element of the charged offence.<sup>944</sup> The State is additionally embargoed from questioning an accused concerning his or her prior convictions. The State may however deviate from the embargo against questioning in certain circumstances. Section 197(d) of the CPA empowers the State to question an accused about prior convictions if the questioning can prove that the

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<sup>940</sup> See DP van der Merwe & WH Schmidt and DT Zeffertt “Evidence” in WA Joubert & JA Faris (eds) *LAWSA 18 3* ed (2016) para para 126.

<sup>941</sup> *Harris v DPP* (1952) AC 694 (HL) at 710 (“*Harris*”).

<sup>942</sup> Zeffertt & AP Paizes *The Law of Evidence* 295. See further 296 for their summary for the preferred modern approach to the admission of similar fact evidence.

<sup>943</sup> Zeffertt & Paizes advance that this common law rule presumably “expressly” became a part of the South African common law of evidence in terms of section 252 of the CPA which states that English law of evidence still in force on the 30<sup>th</sup> of October 1961 shall apply if not expressly provided for in terms of the CPA or any other law. See Zeffertt & AP Paizes *The Law of Evidence* 260.

<sup>944</sup> Section 89 of the CPA.

accused has committed the offence that he or she is currently charged with.<sup>945</sup> Section 211 of the CPA additionally states the following; supplementing section 89:

Except where otherwise expressly provided by this Act or the Child Justice Act, 2008, or except where the fact of a previous conviction is an element of any offence with which an accused is charged, evidence shall not be admissible at criminal proceedings in respect of any offence to prove that an accused at such proceedings had previously been convicted of any offence, whether in the Republic or elsewhere, and no accused, if called as a witness, shall be asked whether he or she has been so convicted.

The crux is therefore that a charge may reference a previous conviction and an accused may potentially be questioned about these convictions if the aforementioned conviction is an *element* of the crime that he is currently being accused of.<sup>946</sup> These convictions may consequently be proven via section 211. The most patent example may be escaping from prison – the fact that the person was imprisoned for a crime is an underlying fact and element to the subsequent crime of escaping prison.<sup>947</sup> Kruger notes that there is a disharmony between sections 197(d) and 211. Section 211 only shields against the proof of previous convictions and not in situations where an accused had in fact previously committed a crime but did not result in a charge against them or in situations where a person was accused of a crime but was not found guilty. Section 197(d) however does shield an accused against this line of questioning.<sup>948</sup>

A review of the South African case law interpreting section 211 echoes the rationale for the general rule excluding similar fact evidence. In *S v Mthembu and others* (“*Mthembu*”),<sup>949</sup> Smalberger JA, delivering judgment for the Appellate Division, stated that the motivation behind sections 197 and 211 was to protect the accused from undue prejudice and that questioning an accused about prior convictions would amount to a *prima facie* irregularity.<sup>950</sup> The learned judge went further and stated that

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<sup>945</sup> See also Schwikkard & Van der Merwe *Principles* 69; A Kruger “Previous Convictions in *Hiemstra’s Criminal Procedure* 10 ed (RS 2017) 27-3.

<sup>946</sup> Schwikkard & Van der Merwe *Principles* 47; 67-68; 76-77. Also see A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) 36.

<sup>947</sup> In terms of section 117 of the Correctional Services Act 111 of 1998. See *S v Mthembu and others* [1988] 3 All SA 561 (AD) at 571, where Smalberger J uses this example.

<sup>948</sup> A Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 7 ed (2010) 570.

<sup>949</sup> [1988] 3 All SA 561 (AD).

<sup>950</sup> *Mthembu* at 564.

instances where similar fact evidence is expressly allowed (such as with sections 197 and 211) cross-examination of this vexed category of evidence must be limited to extract information relevant to the issues before a court, even in instances where the accused himself has revealed this information.<sup>951</sup> Smalberger JA was thus cautious of the use of similar fact evidence, even in instances where it is statutorily permissible and probably envisioned the danger of misuse by the prosecution in an attempt to attack the character of an accused. The conclusion in this case, regarding the issue of cross-examination pertaining to a prior conviction, was that fairness and justice prohibited that line of questioning.<sup>952</sup>

Another issue that arose in *Mthembu* was the effect of prisoners appearing in their prison garb during an unrelated trial. The Court was of the opinion that the only time when such an appearance would be appropriate, is where the accused had committed a crime in prison or when an accused is being prosecuted for a crime relating to his imprisonment, such as escaping from custody.<sup>953</sup> Subsequent cases have investigated this practice in the light of the Constitution. In *S v Phiri* ("*Phiri*"),<sup>954</sup> the Transvaal Provincial Division came to the conclusion that the accused appearing in prison garb would not *ipso facto* constitute an irregularity but each case would have to be analysed on its merits.<sup>955</sup> Van der Westhuizen and Webster JJ also stated that the appearance of a prisoner in prison garb would amount to an inadmissible evidence of a previous conviction of the accused.<sup>956</sup> Furthermore, such an appearance would violate an accused's right to a fair trial, more specifically section 35(3)(h) of the Constitution, which protects the presumption of innocence of an accused.<sup>957</sup> The justices then submit that the subsections to section 35(3) do not amount to a closed list of protections but go further and broader to protect the rights of the accused.<sup>958</sup>

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<sup>951</sup> *Mthembu* at 565. Also see Paizes "Evidence" in E Du Toit & SE Van der Merwe *Commentary on the Criminal Procedure Act* vol 2 (RS 53 2014) 24-22Q.

<sup>952</sup> *Mthembu* at 565.

<sup>953</sup> *Mthembu* at 571. Also see Paizes "Evidence" *Commentary* 24-22Q.

<sup>954</sup> 2005 (2) SACR 476.

<sup>955</sup> *Phiri* at 15

<sup>956</sup> *Phiri* at 4.

<sup>957</sup> *Phiri* at 4.

<sup>958</sup> *Phiri* at 4 where the Court refers to *Zuma* (see 5 3 above).

The constitutional values of dignity, equality and freedom are fundamental values of the Constitution and are intrinsic to the fair trial rights.<sup>959</sup>

It is clear that section 211 is still there to protect the accused from prejudices first voiced in *Cole* and subsequent judgments such as *Makin*. There is however no authority on how to deal with prior convictions as an *element* of a separate offence which is the relevant issue here. Paizes relies on *Mthembu* to suggest that the *fact* of an accused's previous convictions may suffice and not the details thereof.<sup>960</sup>

It is submitted that, in order to ensure that the subsequent trial of the accused remains fair, it must be ensured that the mind of the judicial officer is kept as objective as possible. Details surrounding previous convictions (the predicate crimes) must not, as far as possible and in line with the traditional approach, be allowed during a hearing for criminal gang activities. A failure to do so would result in an unjust assault on the character of the accused. This is furthermore unfair because in other instances the admittance of prior convictions would only occur in *extraordinary* cases, but it is the norm when convicting an accused in terms of Chapter 4 of POCA. Thus, everything must be done to neutralise the prejudicial effect of admitting evidence of prior convictions.

### **5 3 1 3 2      *The Child Justice Act 75 of 2008*<sup>961</sup>**

Children often fall victim to gangs, either as victims or when they are forced to join as a survival mechanism.<sup>962</sup> Children may, in circumstances, be diverted from the formal criminal justice system and rather diverted in terms of the Child Justice Act 75 of 2008 ("the CJA").

The CJA makes several references to the existence of prior convictions. This is to, *inter alia*, assess whether it is in the interests of justice to release a child to the care of a parent or guardian,<sup>963</sup> whether to further detain a child in prison<sup>964</sup> and as a factor

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<sup>959</sup> *Phiri* at 4. The Court here refers to *Dzukuda* at 9.

<sup>960</sup> Paizes "Evidence" *Commentary* 23-32; *Mthembu* 561.

<sup>961</sup> The CJA has also been discussed in Chapter 4 as a part of the sentencing of gang offences – see 4 5 3 above.

<sup>962</sup> See 2 2 above.

<sup>963</sup> Section 24(3)(b) of the CJA.

<sup>964</sup> Section 30(3)(c) and 30(5)(a) of the CJA.

in the assessment of an alleged child offender.<sup>965</sup> A prior conviction must be placed before the magistrate in terms of a section 47 preliminary inquiry.<sup>966</sup> A diversion order in terms of the CJA also does not constitute a “previous conviction” in terms of the CPA<sup>967</sup> and would thus not receive the protection of section 211 of the CPA but would be shielded through sections 210 and 197(d).<sup>968</sup> Offences that were diverted in terms of the CJA will therefore not qualify as predicate offences under POCA.

In circumstances where a child older than fourteen years has been found guilty of a Schedule 1 offence (in terms of the CPA) the court may impose a sentence of imprisonment if the child offender has a record of relevant convictions and substantial and compelling reasons exist for such a sentence.<sup>969</sup> These offences therefore qualify as predicate offences under POCA and a child may potentially face prosecution under POCA.

### **5 3 1 3 3      *The Prevention of Organised Crime Act***

The enactment of POCA brought about several departures from the traditional framework of the South African law of evidence. The most important provision is section 2(2), which provides a relaxed approach to the admissibility of evidence and states that

[t]he court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsection (1), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.

As already mentioned above (and acknowledged in section 2(2) of POCA itself), similar fact evidence and consequently prior convictions, are generally inadmissible. POCA deviates from this rule and allows a court to hear such evidence in relation to offences involving racketeering activities in terms of subsection 2(1). Kruger notes that similar fact evidence will otherwise not be admissible if it does not relate to subsection

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<sup>965</sup> Section 35(c) of the CJA.

<sup>966</sup> Section 47(3)(c) of the CJA.

<sup>967</sup> Section 59(1)(b) of the CJA.

<sup>968</sup> See 5 3 1 3 1 above. In terms of section 87 of the CJA, however, child offender convictions will be expunged under certain circumstances and after certain time periods have elapsed.

<sup>969</sup> Section 77(3)(c).

2(1) but in the same breath warns against the dangers of admitting such prejudicial evidence.<sup>970</sup> It is important to note that Chapter 4 of POCA does not contain a similar provision for allowing previous convictions. It may merely be “careless drafting”<sup>971</sup> that an equivalent provision was not included in Chapter 4. This *lacuna* (or, *casus omissus*) is probably remedied, at least at face value, by section 211 of the CPA.<sup>972</sup> A court would further not be empowered to hear evidence relating to *hearsay* relating to Chapter 4 of POCA and would have to rely on the exceptions under the General Law Amendment (“GLAA”) Act 45 of 1988.<sup>973</sup> The Court in *Thomas* relied exclusively on the GLAA in considering the admissibility of hearsay.<sup>974</sup>

The Free State Division of the High Court in *S v Frederiksen* (“*Frederiksen*”)<sup>975</sup> was not forgiving in its finding relating to the ostensible *casus omissus* by the Legislature. The case concerned charges under the National Health Act 61 of 2003 (“the Health Act”) which related to the removal of human tissue without written consent. The relevant provisions of the Health Act<sup>976</sup> however did not create offences for this unlawful act despite the fact that the act which it replaced, the Human Tissue Act 65 of 1983, did so. Daffue J refers on constitutional principles,<sup>977</sup> the sentencing powers of the courts, principles of statutory interpretation enunciated in *Cool Ideas v*

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<sup>970</sup> A Kruger *Organised Crime* 36.

<sup>971</sup> See Kruger *Organised Crime* 72 where the author, albeit in a different context, alluded to the fact that there may have been careless drafting involved when the Legislature crafted Chapter 4.

<sup>972</sup> See 4 4 4 above for a comprehensive discussion on the practical implications of this *casus omissus*.

<sup>973</sup> See sections 3(1)(a) and (c) of the GLAA. See further Schwikkard & Van der Merwe *Principles* Chapter 13 and Zeffertt & Paizes *The Law of Evidence* Chapter 13.

<sup>974</sup> See, for example, *Thomas* paras 20-26.

<sup>975</sup> 2018 (1) SACR 29 (FB).

<sup>976</sup> Sections 55 and 58 of the Health Act.

<sup>977</sup> For example, the principle of legality (specifically *nullum crimen sine lege* and *nulla poena sine lege*) as well as sections 35(3)(l) and (n) which form part of the accused’s fair trial rights. Section 35(3)(l) is essentially the constitutional codification of *nullum crimen sine lege* and *nulla poena sine lege*. Section 35(3)(n), on the other hand, states that the accused has the “benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing”. These principles function in favour an accused and essentially function to protect an accused from the arbitrary deprivation of freedom. See 5 3 2 below for a comprehensive discussion on the principle of legality.



*Hubbard*,<sup>978</sup> “the clear and unambiguous language of the legislature,” the context of the Health Act and background circumstances. The Court was resolute in finding that it could not venture into creating offences “(...) merely because it might be of the view that a *casus omissus* has occurred”.<sup>979</sup>

The approach in *Frederiksen* has to be compared to the controversial judgment in *R v Forlee* (“*Forlee*”).<sup>980</sup> The Court in *Forlee* found that it was within the powers of the courts to punish conduct, even though there was no indication that the conduct (the sale of opium other than a pharmacist) was a crime or that it was punishable. It was held that “an inference of an intention to criminalise the prohibited conduct” could be made, considering the statutory language.<sup>981</sup> De Villiers JP and Mason J found that “the act in question was expressly prohibited in the public interest and with the evident intention of constituting an offence, it is punishable under our law”.<sup>982</sup> This approach cannot be supported as it could potentially constitute a violation of the principle of legality.<sup>983</sup>

The same logic in *Frederiksen* would apply here in allowing similar fact evidence and hearsay under Chapter 4 of POCA and in the context of expanding the dragnet of criminalisation. Considerations of legality are at stake.

A court, in light of the judgment in *Frederiksen*, would therefore have to take extreme care in the consideration of hearsay evidence under Chapter 4 of POCA and only allow it as per the GLAA and similarly only allow similar fact evidence under the provisions of the CPA. Where an accused faces charges under both Chapters 2 and

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<sup>978</sup> 2014 (4) SA 474 (CC). The Constitutional Court at para 28 confirmed that a statute “must be given their ordinary grammatical meaning” but there are three “interrelated riders” qualifying this general principle, specifically

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a) [footnotes omitted].

<sup>979</sup> *Frederiksen* para 16.

<sup>980</sup> 1917 TPD 52.

<sup>981</sup> *Forlee* at 56; *Frederiksen* para 16.

<sup>982</sup> *Forlee* at 56.

<sup>983</sup> See 5 3 2 below.

4 of POCA, a court should only follow the relaxed approach for hearsay and/or similar fact evidence for the charges under Chapter 2. If hearsay evidence and/or similar fact evidence pertains to the charges under POCA Chapter 4, then the evidence must *only* be allowed by the court in terms of the empowering provisions under the GLAA or the CPA. The answer is not quite as obvious where a single criminal endeavour gives rise to charges under both Chapters 2 and 4. This author submits that it would be impermissible to use hearsay evidence admitted under Chapter 2, for charges under Chapter 4 – even where it relates to the same criminal endeavour. Section 2(2) clearly states that “[t]he court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, *relating to offences contemplated in subsection (1) (...)*”. Subsection (1) refers to section 2(1) – racketeering offences. A strict and proper interpretation of the statute would therefore not allow this evidence to be admissible for charges under Chapter 4 of POCA. That would lead to the anomaly that the State would have to argue for the same hearsay or similar fact evidence to be admitted under the respective statutes, despite it being admitted as evidence already. This is admittedly a strict approach but the only proper interpretation of the statute in light of the ostensible *casus omissus*.

Some of these evidentiary issues as well as various other constitutional challenges were addressed in the High Court judgment of *Savoi and Others v National Director of Public Prosecutions and Another* (“*Savoi I*”)<sup>984</sup> and the subsequent Constitutional Court judgment in *Savoi and Others v National Director of Public Prosecutions and Another* (“*Savoi II*”).<sup>985</sup>

The applicants in *Savoi I* argued that the admission of the previous convictions of the accused in terms of POCA subsection 2(2) violated his right to a fair trial in terms of section 35(3) of the Constitution.<sup>986</sup> It was further argued that the relevant provisions of POCA were broad in scope and “irrational meaningless and unconstitutional” because the Act contains no guidelines for the admission of these types of evidence.<sup>987</sup> The respondents replied by arguing that these expansions to the traditional rules of the law of evidence were necessary in order to combat sophisticated

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<sup>984</sup> [2013] 3 All SA 548 (KZP).

<sup>985</sup> 2014 (5) SA 317 (CC).

<sup>986</sup> *Savoi I* 114.

<sup>987</sup> *Savoi I* 115.

organised crime. Consequently, a more flexible approach to the traditional evidentiary rules must be followed. This flexible approach, so the respondents alleged, did not interfere with the criminal onus of proof and that the admission of evidence remains in the sphere of the judicial officer's discretion.<sup>988</sup>

Madondo J confirmed that it is the duty of the judicial officer to guard against inadmissible evidence. He referred to *S v Aimes* ("*Aimes*")<sup>989</sup> and stated that the standard for admitting such evidence (in terms of the discretion of the judicial officer) is found in this case. It was decided in *Aimes* that evidence may only be allowed when the admission of that evidence does not result in an unfair trial or is otherwise prejudicial to the administration of justice.<sup>990</sup>

The Court in *Savoi I* identified two exceptions to the prohibition against the proof of prior convictions: Firstly, when the probative value surpasses the prejudicial effect of the inadmissible evidence and secondly when a prior conviction is an element of a separate offence in terms of section 211 of the CPA. Madondo J was of the opinion that subsection 2(2) of POCA upholds the constitutional standard in terms of section 35(5) of the Constitution. Evidence of prior convictions shall consequently be rejected if it renders the trial unfair or is otherwise detrimental to the administration of justice.<sup>991</sup> Consequently, according to Madondo J, considering the fact that subsection 2(2) of POCA incorporates the constitutional guidelines for admissible evidence, it becomes unnecessary to lay down additional guidelines, as alleged by the applicants.<sup>992</sup> This reasoning is somewhat odd. Section 35(5) lays down guidelines as to when to *exclude unconstitutionally obtained* evidence and does not provide guidelines as to how and when exactly evidence should be *included*. Guidelines pertaining to the inclusion of evidence in the context of racketeering would for example be by requiring the predicate offences to be separated by a maximum of ten years. This sets a standard for inclusion by qualifying categories of evidence.

This approach by Madondo J is probably incorrect. It is submitted that the reliance on section 35(5) was incorrect because the vexed issue was never improperly or illegally obtained evidence. Section 2(2) of POCA is reminiscent of section 35(5), and

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<sup>988</sup> *Savoi I* 115.

<sup>989</sup> 1998 (1) SACR 343 (C).

<sup>990</sup> *Aimes* 350.

<sup>991</sup> *Savoi I* 121; *S v Mfene and another* 1998 (9) BCLR 1157 (N) at 1167C and 1168B-D.

<sup>992</sup> *Savoi I* 121.

case law pertaining to trial fairness might be instructive. The relevant constitutional right was the right to a fair trial in terms of section 35(3). The issue was whether this traditionally impermissible category of evidence, excluded due to its prejudicial effects, renders a trial unfair.

The Constitutional Court in *Savoi II* addressed the same issues as discussed in the High Court judgment in *Savoi I* but followed a different approach. The applicants argued this time that the inclusion of otherwise inadmissible evidence in terms of section 2(2) of POCA would automatically constitute an unfair trial.<sup>993</sup> Madlanga J, in a unanimous judgment by the Constitutional Court, came to the conclusion that the inclusion of prior convictions, in terms of sections 211 of the CPA and 2(2) of POCA, did not offend section 35(3) of the Constitution.<sup>994</sup> The Court then further approached the challenge to admission of prior convictions mainly through the lens of similar fact evidence.<sup>995</sup> The Court correctly pointed out that the law pertaining to similar fact evidence has been surrounded by confusion, possibly due to the “vast morass of authority”.<sup>996</sup> Madlanga J additionally mentions that the so-called category approach as developed after *Makin* is still the law of the land in South Africa. The Court doubted why evidence pertaining to the proclivity of a certain accused is not relevant to the issue before a court. There was however no undertaking to suggest how the law relating to similar fact evidence should be developed but is in favour of a less restrictive approach.<sup>997</sup> It was however firm in its stance in asserting that similar fact evidence and evidence of prior convictions is, under certain circumstances, an acceptable category of evidence and does not automatically render a trial unfair.<sup>998</sup>

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<sup>993</sup> *Savoi II* at 36. Also see IM Rautenbach “Overview of Constitutional Court Judgments on The Bill of Rights – 2014” (2015) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 379 391.

<sup>994</sup> *Savoi II* para 60

<sup>995</sup> *Savoi II* para 62.

<sup>996</sup> See *Savoi II* 50 and fn 75, where Madlanga J refers to an article by Zeffertt – see DT Zeffertt “Similar-fact Evidence in Criminal Proceedings” (1977) 94 *South African Law Journal* 399 399.

<sup>997</sup> *Savoi II* para 58.

<sup>998</sup> *Savoi II* para 59.

## 5 3 1 4 *Foreign law*

### 5 3 1 4 1 *USA*

Constitutional challenges to STEP have not addressed the use of prior convictions as elements of a separate crime. There have, however, been concerns about the use of prior convictions constituting double jeopardy. In *In re Jose P.* (“*Jose P.*”),<sup>999</sup> the appellant argued that the underlying “objective and intent as to both crimes had to be the same” thus constituting double punishment for the same act. The Court did not agree with this reasoning and stated that section 186(22) required “a separate intent and objective from the underlying felony committed on behalf of the gang”.<sup>1000</sup> Premo J relied on *People v. Herrera* (“*Herrera*”) <sup>1001</sup> where the court in a similar situation came to the conclusion that the accused had “two independent, even if simultaneous, objectives”.<sup>1002</sup>

### 5 3 1 4 2 *Canada*

The Court in *R v Terezakis* (“*Terezakis*”) <sup>1003</sup> addressed the use of prior convictions as predicate elements. The respondent argued that his right to a fair trial would be infringed upon due to the reliance on evidence of his bad character which would otherwise be inadmissible.<sup>1004</sup> Although the Court conceded that there is a risk of unfair prejudice, especially in the context of jury trials, the probative value of evidence of general propensity and bad character outweigh such prejudice. A trial judge furthermore retains his or her residual discretion to exclude evidence if the prejudicial effect outweighs the probative value.<sup>1005</sup>

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<sup>999</sup> 106 Cal.App.4th 458 (2003).

<sup>1000</sup> *Jose P.* 471.

<sup>1001</sup> (1999) 70 Cal.App.4th 1456.

<sup>1002</sup> *Herrera* 1467-1468.

<sup>1003</sup> 2007 BCCA 384. Appealing from the Supreme Court of British Columbia in *R. v. Accused No. 1 et al.*, 2005 BCSC 1727 (“*Accused*”).

<sup>1004</sup> *Terezakis* paras 46.

<sup>1005</sup> *Terezakis* paras 46-47.

### 5 3 1 5 *Evaluation*

The South African common law, as influenced by English law and developed by case law and the subsequent statutory developments, makes it clear that under certain circumstances a court may hear evidence of an accused's prior convictions. Statutory exceptions, such as those contained in POCA and empowered by the CPA, have created scenarios that were never envisioned by Lord Herschel and others who developed the rule as it applies in South Africa today. It thus becomes difficult to reconcile the "morass of authority" with modern considerations. The inclusion of prior convictions can be readily justified if one considers that the predicate offences have "material bearing on the issue to be decided"<sup>1006</sup> and are not used to show that the accused has the propensity to commit a certain type of crime. One could possibly argue that the accused is convicted *because* he has committed a certain type of crime (those listed in Schedule 1 to POCA) repeatedly.

It is best to view the relevant sections of POCA strictly for what they are: a separate crimes relying on past events as their elements and therefore having material bearing on the issue before the court. All that has to be proved (and should be proved) is the *fact* that the accused had committed the predicate offences.<sup>1007</sup> Categorising predicate crimes as *similar* fact evidence, as the Constitutional Court in *Savoi II* has done, might also be somewhat of a misnomer because the *actus reus* of crimes listed in Chapters 2 and 4 will often substantially differ from the underlying predicate acts.

The South African Law Reform Commission's report entitled *Review of the Law of Evidence ("Project 126")*<sup>1008</sup> made no recommendations regarding the use of prior convictions in terms of section 211 of the CPA but it was mentioned in its *Report on Sexual Offences ("Project 107")*.<sup>1009</sup> Project 126 succinctly reflects the position in our law by stating that similar fact evidence may be used if its function is other than evidence of character. Although this is a somewhat rudimentary view of the matter, it can once again be seen that evidence of prior convictions is an accepted and admissible category of evidence. The main qualifier is that it should not be used as a

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<sup>1006</sup> See *Harris* at 710.

<sup>1007</sup> See 5 3 1 1 3 above.

<sup>1008</sup> South African Law Reform Commission *Review of the Law of Evidence (Issue Paper 26): Project 126* (2008).

<sup>1009</sup> South African Law Commission *Report on Sexual Offences: Project 107* (2002).

weapon against the character of the accused. If so, the judicial officer still has a residual discretion not to allow the evidence where that is its only function and is not being used as an element to prove the crimes under Chapters 2 and 4. The inclusion of prior convictions under Chapters 2 and 4 of POCA thus does not violate the right of an accused to a fair trial.

### 5 3 2 *The principle of legality*

#### 5 3 2 1 **Introduction**

It is necessary to analyse Chapters 1 and 4 of POCA in light of the principle of legality. The principle of legality is a foundational principle of our constitutional democracy<sup>1010</sup> and functions to constrain the powers of the judicial, executive and legislative branches of the government and also to prevent misuse of their powers – therefore protecting the persons that are subjected to these powers.<sup>1011</sup>

The content of the principle manifests in the Latin maxim *nullum crimen, nulla poena sine lege* or, no crime, no punishment without law,<sup>1012</sup> coined by Paul von Feuerbach.<sup>1013</sup> Von Feuerbach's formulation calls for two categories. Firstly, it requires that

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<sup>1010</sup> *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) ("Prins") at para 6.

<sup>1011</sup> *Prins* at para 6. Also see L Jordaan "Die legaliteitsbeginsel en die toelaatbaarheid van regterlike aktivisme by die ontwikkeling van die substantiewe strafreg (deel 1)" (2014) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 264 264 fn 2 where the author refers to *Prins*. See further CR Snyman *Criminal Law* (2008) 36; CR Snyman *Strafreg* (2012) 37. L Mnguni & J Muller "The principle of legality in constitutional matters with reference to *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC)" (2009) 13 *LDD* 112 113 as well as DC van der Linde 'n *Patroon van kriminele bende-aktiwiteite: Die oplossing tot Suid Afrika se bendemisdaad of 'n wit olifant? 'n Kritiese, regsvergelykende en konstitusionele studie van Hoofstuk 4 van die Wet op die Voorkoming van Georganiseerde Misdaad 121 van 1998* Unpublished LLM dissertation (2015) 50. Also, see *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at especially paras 53-58 where the Constitutional Court discussed the control of public power under the greater umbrella of the rule of law. The exercise of public power, which was subject to the rule of rule in the pre-constitutional era, is now subject entrenched in the Constitution – especially section 1(c).

<sup>1012</sup> See generally R Ramosa "The limits of judicial law-making in the development of common-law crimes: Revisiting the *Masiya* decisions" (2009) 3 *South African Journal of Criminal Justice* 353 358.

<sup>1013</sup> IL Fraser "The Foundations of Criminal Law and the Nullum Crimen Principle" (2007) 5 *JICL* 1005 1008. For the original text, see PJA von Feuerbach *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* 11 ed (1832) 18-19.



(I) [a]ny infliction of punishment presupposes a penal law. (Nulla poena sine lege.) For only the threat of evil by law constitutes the foundation of the notion, as well as the legal possibility, of punishment.

And furthermore that an

(II) [i]nfliction of punishment is conditional upon the existence of the action subject to the threat. (Nulla poena sine crimine) For the law links the threatened punishment to the act as a legally necessary precondition of punishment.<sup>1014</sup>

Courts are confined to the definition of that crime and may not extend that crime or create new crimes to punish the conduct of the accused.<sup>1015</sup> The rationale behind this principle is that it protects the members of the public from arbitrary punishment, deprivation of freedom and protects human dignity.<sup>1016</sup> The common law principle of legality, now manifested in section 35(3) of the Constitution, facilitates the protection of especially two constitutional rights of accused persons, specifically the right not to be detained without just cause (section 12(1)(a)) and dignity (section 10).<sup>1017</sup>

There was insurgency in Europe against the forces in power during the Age of the Enlightenment. This was the era of inception for the principle of legality<sup>1018</sup> and during that time two texts spoke of aspects reminiscent of the modern principle of legality. The Italian criminologist and jurist Cesare Beccaria<sup>1019</sup> made several references to the restriction of public power and the deprivation of civil liberties in his seminal treatise *Dei delitti e delle pene* in 1764. Beccaria was firm on the function of judicial officers and for example stated that

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<sup>1014</sup> Fraser (2007) *JICL* 1008; von Feuerbach *Lehrbuch* 12-19.

<sup>1015</sup> *LAWSA* par 22. In *S v Ndebele and Others* 2012 (1) SACR 245 (GSJ) (“*Ndebele*”), however, the South Gauteng High Court division of the High Court extended the definition of theft to include electricity theft, based on the fact that even though electricity is invisible it does take on a physical manifestation. See *Ndebele*, especially 254-256.

<sup>1016</sup> JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35.

<sup>1017</sup> Also see F Snyckers & J Le Roux “Criminal Procedure: Rights of Arrested, Detained and Accused Persons” in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 07-06) 51-2, as well as Ramosa (2009) *South African Journal of Criminal Justice* 385.

<sup>1018</sup> Snyman *Criminal Law* 39; *Prins* para 7.

<sup>1019</sup> The classical formulation of the principle of legality is said to originate from Beccaria and Paul von Feuerbach. See EM Wise “Criminal Law” in Clark & Ansary (eds) *Introduction to the Law of the United States* (2002) 139 140-141.

[t]he laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then, (as he is one of the society,) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws. But as a punishment, increased beyond the degree fixed by the law, is the just punishment with the addition of another, it follows that no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws.<sup>1020</sup>

Later, the French Declaration of the Rights of Man and the Citizen (“the French Declaration”) in 1789 declared in articles 7 and 8:

- (7) No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed. Those who solicit, expedite, carry out, or cause to be carried out arbitrary orders must be punished; but any citizen summoned or apprehended by virtue of the Law, must give instant obedience; resistance makes him guilty.
- (8) The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied.<sup>1021</sup>

In its substantive application under South African law, statutes or crimes under the common law that violate the principle could be challenged and may be declared unconstitutional or voided by a court.<sup>1022</sup> This ancient principle, which has been judicially developed and entrenched in the Constitution, finds expression in five distinct yet sometimes overlapping facets. Firstly, there is the *ius acceptum* principle which requires an offence must be recognised under the common law or statute for an accused to be found guilty of that crime. Secondly, *ius praeivium* requires the offence to have existed at the time of the commission of the crime. The *ius strictum* principle thirdly requires courts to interpret statutes or the common law in a strict fashion and fourthly *ius certum* requires crimes to be expressed in a clear and certain terms, and

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<sup>1020</sup> See C Beccaria *On Crimes and Punishment* (1764) (original text); See PH Nicklin *An Essay on Crimes and Punishments* (1819) 20 (translated text)..

<sup>1021</sup> Translated from the original French text.

<sup>1022</sup> *Savoi I* at 104; *LAWSA* par 22.

finally, the prescribed punishment must also comply with the aforementioned principles.<sup>1023</sup>

### **5 3 2 2      *The principle of legality in constitutional perspective***

It is submitted that the definitions in section 1 of POCA potentially violate the principle of legality by utilising dubiously wide descriptions. These definitions make use of the word “includes” at the beginning of the definitions thus rendering the definitions merely directory, as well as vague and thus possibly unconstitutional.

The definition of “criminal gang” in terms of section 1 reads as follows:

‘[C]riminal gang’ *includes* any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>1024</sup>

The other problematic definition relates to a “pattern of criminal gang activity”. It provides that a pattern of criminal gang activity

*includes* the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed

(a) on separate occasions;

(b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang<sup>1025</sup>

These constitutionally suspect provisions will now be evaluated through the three relevant facets of the principle of legality.

#### **5 3 2 2 1      *ius certum***

*Ius certum* requires legislation to be drafted or phrased in certain and clear terms. This principle does not necessitate absolute certainty but must at least be capable to

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<sup>1023</sup> JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35-37.

<sup>1024</sup> Own emphasis.

<sup>1025</sup> Own emphasis.

reasonable interpretation and application.<sup>1026</sup> Section 35(3)(a) of the Constitution entrenches this principle and states that the accused “to be informed of the charge with sufficient detail to answer it” because, as Burchell points out, criminal laws that are drafted in vague terms impair an accused person’s right to a fair trial.<sup>1027</sup> If a statute is drafted vaguely, an accused cannot know how to adjust his or her conduct in order to avoid traversing the line between legal and illegal conduct,<sup>1028</sup> or know how to adequately respond to a charge against them. The (partially) uncodified criminal law system of South Africa also poses an additional danger to the *ius certum* principle due to conflicting and sometimes inaccessible judgments which do not promote legal certainty.<sup>1029</sup> The law can however not remain static. This creates a tension with the duty on courts to “promote the spirit, purport and object of the Bill of Rights” when interpreting legislation or developing the common law in terms of section 39(2) of the Constitution and there have been examples in case law where judicial development or extension of definitions by analogy have been appropriate in order to address modern or evolved circumstances that the common law or legislation did not address.<sup>1030</sup> Phelps, in response to Snyman’s critique against the controversial Constitutional Court judgment in *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* (“*Masiya*”)<sup>1031</sup>, correctly pointed out that

[i]f the Constitutional Court is prohibited from intervening in order to bring the law in line with the rights contained in the Bill of Rights, the concept of constitutional supremacy is robbed of substance.<sup>1032</sup>

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<sup>1026</sup> See *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 108-109.

<sup>1027</sup> JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35.

<sup>1028</sup> J Grant “Defences under the protection of State Information Bill: Justifications and the demands of certainty” (2012) 28 *South African Journal of Human Rights* 328 343.

<sup>1029</sup> Snyman *Strafreg* 40-41.

<sup>1030</sup> K Phelps “A Dangerous Precedent Indeed—A Response To CR Snyman’s Note on *Masiya*” (2008) 128(4) *South African Law Journal* 648 658.

<sup>1031</sup> 2007 (5) SA 30 (CC).

<sup>1032</sup> Phelps (2008) *South African Law Journal* 658.

*Ius certum* has often manifested itself as the doctrine of vagueness in case law and has been the focus of various disputes since the advent of the Constitution. The principle provides suitable criteria against which to measure the constitutionally suspect provisions of POCA. The Constitutional Court in *Savoi II* has addressed the issue of vagueness of certain provisions in Chapters 1 and 2 of POCA. The applicants in *Savoi II* argued that the definition of “pattern of racketeering activity” was unconstitutionally vague and thus void. Furthermore, the applicants argued that the definition of “enterprise” was overbroad and unconstitutional.<sup>1033</sup>

In addressing these assertions, Madlanga J refers to the Constitutional Court’s previous judgment in *Affordable Medicines Trust and Others v Minister of Health and Others* (“*Affordable Medicines*”)<sup>1034</sup> where the Court considered the meaning of the vagueness doctrine. There, Ngcobo J stated that the principle of legality requires that legislation must be constructed in a “clear and accessible manner”.<sup>1035</sup> The doctrine does however not require “perfect lucidity” but only “reasonable certainty”.<sup>1036</sup> It appears if Ngcobo J formulated the test for vagueness in South African law to be whether those affected by the statute can, with reasonable certainty, ascertain what is required of them.<sup>1037</sup>

The Court in *Affordable Medicines* also refers to *R v Nova Scotia Pharmaceutical Society* (“*Nova Scotia*”)<sup>1038</sup> where the Canadian Supreme Court investigated the vagueness doctrine in light of judgments by the European Court of Justice. The Court in *Nova Scotia* makes several important observations. A legislature might *have* to phrase legislation in broad terms in order to achieve its objectives. Drafting legislation in such broad terms is necessary because public policy evolves over time and its effect on legislation and the application in specific cases, over time, will vary.<sup>1039</sup> Legislation drafted in strict terms furthermore obstructs the state from achieving its legislative goals. This might well be the case with these definitions. One of the points of criticism

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<sup>1033</sup> *Savoi II* 15.

<sup>1034</sup> 2006 (3) SA 247 (CC).

<sup>1035</sup> *Affordable Medicines* para 108 where the Constitutional Court is referring to *R v Pretoria Timber Co (Pty) Ltd and Another* 1950 (3) SA 163 (A).

<sup>1036</sup> *Affordable Medicines* para 108, referring to the judgement in *R v Jopp and Another* 1949 (4) SA 11 (N).

<sup>1037</sup> *Affordable Medicines* para 109.

<sup>1038</sup> 1992 CanLII 72 (SCC).

<sup>1039</sup> *Nova Scotia*

against criminalising gang activity in terms of a statute, is that such a statute presupposes that gangs share certain universal characteristics.<sup>1040</sup> A balance between the state's so-called "social interests" and the rights of an accused is consequently required. Lastly, Madlanga J observes that legislation drafted in general terms might be more accommodating towards the fundamental rights of an accused and might not require invalidation, as with the case under a strictly defined statute.<sup>1041</sup>

Madlanga J came to the conclusion that the impugned provisions in POCA were in fact not unconstitutionally vague. This was mainly due to two reasons. Although the applicants contended that the requirements in establishing the pattern of racketeering is so "numerous and varied" that it rendered its entire definition vague, the Court stated that there must be a planned, ongoing, continuous or repeated participation in these offences.<sup>1042</sup> The Court additionally pointed out that the crimes listed in the Schedule go beyond what traditionally constitutes organised crime and that due to the interconnected, varied and orchestrated nature of organised crime, it is necessary to target a varied field of criminal activities that criminal syndicates may engage in.<sup>1043</sup> The second argument, namely the contention that the offences listed in Schedule 1 of POCA were vague, especially those relating to coinage and exchange control,<sup>1044</sup> was also rejected.<sup>1045</sup> While offences may appear obscure in nature and may on the face of it not have anything to do with organised crime, the Court correctly pointed out that organised crime has an interconnected and far-reaching nature, requiring a wide criminal net to be cast,<sup>1046</sup> thus echoing the sentiments in *Nova Scotia*. This nevertheless did not render the entire Schedule unconstitutionally vague.<sup>1047</sup> Madlanga J stated that most people would certainly be aware of the *existence* of such

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<sup>1040</sup> Burchell *Principles* 909-910.

<sup>1041</sup> *Nova Scotia* 641.

<sup>1042</sup> *Savoi II* para 18.

<sup>1043</sup> Paras 22-27.

<sup>1044</sup> Respectively items 21 and 26 of Schedule 1.

<sup>1045</sup> *Savoi II* [20].

<sup>1046</sup> The Ontario Superior Court of Justice in *R v Lindsay 2004* (2004) 182 C.C.C. (3d) 301 ("*Lindsay 2004*") made a similar statement and also rejected claims that the relevant sections of the Code, which allowed for a myriad of seemingly random predicate crimes to be used, were impermissibly overbroad. It conceded that the nature of organised crime did not lend itself to a closed list of crimes. See *Lindsay 2004* para 44.

<sup>1047</sup> *Savoi II* [20].

offences in broad terms, even though they may not know the *exact* content of the prohibitions.<sup>1048</sup> This statement is made in reference to the Appellate Division judgment in *S v De Blom* (“*De Blom*”)<sup>1049</sup> where it was stated that it is not necessary for the accused to know the precise terms of the legislation that he or she is contravening but only that the act is unlawful or for the accused to foresee the possibility of it being unlawful.<sup>1050</sup>

This approach has not been without criticism. Freedman argues that the methodology and approach shows the Constitutional Court’s reluctance to follow a strict application of the vagueness doctrine.<sup>1051</sup> This is due to the wide and obscure range of offences in terms of Items 21 and 26 of Schedule 1, with reference to the South African Reserve Bank Act 90 of 1989 (“Reserve Bank Act”) and Prevention of Counterfeiting of Currency Act 16 of 1965 (“Counterfeiting Act”), as well as the Exchange Control Regulations (promulgated in GN R111).<sup>1052</sup> Section 34(1)(f) of the Reserve Bank Act, for example, criminalises the act of defacing, soiling, damaging or attaching drawings to any coin which is legal tender. If a group of vandals make it their objective to repeatedly deface South African coins, they could potentially be held criminally liable for several of the offences listed in Chapter 4 of POCA. Whether the general public knows of the existence of such an offence and that committing it various times, with a group of people, could result in a gang conviction, is open for debate but is strongly doubted. Freedman does however concede the fact that the attack in *Savoi II* was brought in the abstract and not based on specific factual matrix and the Court only had to show that items 21 and 26 were not *prima facie* vague.<sup>1053</sup>

This problem is not limited to South Africa. Schloenhardt, in his comprehensive review of organised crime legislation, pointed out countries employing a model utilising a list of predicate offences often struggled to achieve a sufficiently expansive list (without it being unconstitutionally broad and uncertain) whilst focusing on crimes that

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<sup>1048</sup> *Savoi II* [21], relying on *S v De Blom* 1977 (3) SA 513 (A).

<sup>1049</sup> 1977 (3) SA 513 (A).

<sup>1050</sup> *De Blom* 530. See *Savoi II* 20.

<sup>1051</sup> W Freedman “Recent cases” (2014) 3 *South African Journal of Criminal Justice* 466 473.

<sup>1052</sup> W Freedman “Recent cases” (2014) 3 *South African Journal of Criminal Justice* 473.

<sup>1053</sup> W Freedman “Recent cases” (2014) 3 *South African Journal of Criminal Justice* 473.



are traditionally associated with organised crime as well as keeping it up to date with emerging criminal trends.<sup>1054</sup>

If the *Affordable Medicines* test<sup>1055</sup> has to be applied to the definitions in Chapter 1 of POCA, they would probably not survive constitutional scrutiny. It could still be argued that people could avoid participating in gangs “in the general sense” but considering the extremely technical nature of “pattern of criminal gang activities” and the plethora of meanings that it *could* encompass, it would be hard for those affected by the legislation to, with reasonable certainty, ascertain what is expected of them in order to avoid prosecution if a court is free to interpret that provision as directory in its current form. Also, considering the wide and varied nature of Schedule 1 which incorporates various crimes contained in different statutes, it could hardly be argued that the crimes are clear, certain and reasonably ascertainable by the general public.

The Court in *S v Jordaan and Others* WCC 16-11-2017 case no CC20/2017 (“*Jordaan*”) admitted to the ambiguity regarding the definition of a “pattern of criminal gang activity”. This judgment will be discussed in the following section.

### **5 3 2 2 2     *Ius strictum***

The aforementioned problems link and somewhat overlap with the second facet, which is the *ius strictum* principle. This principle requires courts not to strain or stretch the words and definitions within a statute in order to bring the conduct of the accused within the ambit of those words and definitions<sup>1056</sup> or extend the scope of crimes by way of analogy. Courts must avoid crossing the “tenuous line between interpretation and innovation”.<sup>1057</sup> In the divisive *Masiya* judgment the Constitutional Court stated that:

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<sup>1054</sup> A Schloenhardt *Palermo on the Pacific Rim: Organised Crime Offences in The Asia Pacific Region* (2009) 270. It appears (as at November 2017) Schedule 1 of POCA has been amended a total of six times over the course of nineteen years. This, inter alia, includes the addition of Item 33A which makes offences under Chapter 2 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 predicate offences for purposes of Schedule 1 of POCA.

<sup>1055</sup> See *Affordable Medicines* 108-109 especially.

<sup>1056</sup> Snyman *Criminal Law* 44; Burchell *Criminal Law & Procedure* 37; R Ramosa “The limits of judicial law-making in the development of common-law crimes: Revisiting the *Masiya* decisions” (2009) 3 *South African Journal of Criminal Justice* 353 360-361.

<sup>1057</sup> Ackermann J in *S v Von Molendorff and Another* 1987 (1) SA 135 (T) at 169 referring to Burchell and Hunt *South African Criminal Law and Procedure vol I (General Principles)* 47-55.

Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the Courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.<sup>1058</sup>

This salient principle of criminal justice can also be found in international law,<sup>1059</sup> such as in article 22(2) of the Rome Statute of the International Criminal Court (“the Rome Statute”):<sup>1060</sup>

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

An underlying value of this principle is that courts should rather elect a (strict) interpretation of a statute that favours the liberty of an accused and avoid a definition that would deprive the accused of his or her liberty.<sup>1061</sup>

These principles can be employed to save the definitions of “pattern of criminal activity” and “criminal gang” from possible unconstitutionality or legislative intervention. Courts must rather strictly adhere to the definitions in Chapter 1 than elect to interpret the definitions as merely being directory. In its current form, a court can interpret these definitions to be of a “nontechnical” or “general nature” as Snyman

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<sup>1058</sup> *Masiya* para 31.

<sup>1059</sup> See also generally G Werle & F Jessberger *Principles of International Criminal Law* 3 ed (2014) 39-41.

<sup>1060</sup> Adopted 17 July 1998 (entered into force 1 July 2002) 2187 UNTS 90. Article 28(a) of the Statute of Rome was considered in light of article 22(2). The Trial Chamber in *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 (15 June 2009) para 423 stated that it was bound by “the principle of strict interpretation (...) mirrored in [article 22(2)] (...) as a part of the principle *nullum crimen sine lege*”. The Trial Chamber seems to have read in a requirement of causality between a superior’s failure to exercise proper control in the resultant crimes that were committed due to this ineffectual control.

<sup>1061</sup> Otherwise known as *in favoram libertas*; see JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 37. See *S v Von Molendorff and Another* 1987 (1) SA 135 (T) at 170, where Ackermann J states that “(...) if there is doubt as to whether particular acts are covered by the definition of a common law crime, the accused ought to be given the benefit of the doubt”. This principle is also reflected in article 22(2) of the Statute of Rome.

claims.<sup>1062</sup> Kruger supports this interpretation by stating that it is not necessary for a “pattern of criminal gang activity” to consist of two or more criminal offences due to the directory nature of the definition.<sup>1063</sup> This is in itself illogical because a pattern inherently has multiple instances. In *S v Eyssen* (“*Eyssen II*”),<sup>1064</sup> in the context of the definition of “pattern of racketeering activity” with reference to offences relating to racketeering activity in Chapter 2, the Supreme Court of Appeal relied on the definition of “pattern” in the Oxford English Dictionary and stated that it was “an order or form discernible in things, actions, ideas, situations, etc. Frequently with [“]of[”] as *pattern of behaviour* = *behaviour pattern*”.<sup>1065</sup> It is clear that reference is made to these aspects in the plural form. This interpretation was relied on with approval by the Constitutional Court in *Savoi II*.<sup>1066</sup> These two “pattern definitions” are however not completely analogous. A “pattern of racketeering activity” in terms of section 1 of POCA

*means* the planned, ongoing, continuous or *repeated* participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1[.]<sup>1067</sup>

Firstly, the Legislature opted to make use of the word “means” at the beginning of the aforementioned definition, in contrast with the “pattern of criminal gang activity” that uses the word “includes” at the beginning of the definition. Secondly, the word “repeated” is used expressly as a manner to describe the required participation in racketeering activity. Kruger posits that the differences may merely be due to careless

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<sup>1062</sup> CR Snyman “Die nuwe statutêre misdaad van deelname aan 'n kriminele bende” (1999) 12 *South African Journal of Criminal Justice* 213 215.

<sup>1063</sup> It appears that Kruger originally did not agree with this interpretation, stating that it may merely be careless drafting by the legislature and the text of the POCA should still be followed by the courts – see A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2008) 56. This opinion seems to have been abandoned in the second edition – see A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* (2013) 2 ed 72. In the second edition the author states that even if it was merely careless drafting, only one predicate crime is required to form a “pattern of criminal gang activity”.

<sup>1064</sup> 2009 (1) SACR 406 (SCA).

<sup>1065</sup> *Eyssen II* at para 8 (Court’s emphasis).

<sup>1066</sup> *Savoi II* para 19.

<sup>1067</sup> Own emphasis.

drafting by the Legislature but this does still not constitute a sufficient reason to require *at least* two predicate acts with regards to a pattern of racketeering activity but only one would suffice to form a pattern of criminal gang activity.<sup>1068</sup> It is suggested here that it is highly unlikely for this to merely be careless drafting but rather the intention of the Legislature to create such wide definitions – especially when one considers that these directory definitions are used twice in definitions relating to the offences in POCA Chapter 4.

As discussed in Chapter 3 of this dissertation, Binns-Ward J in *Jordaan* admitted to the confusion caused by the definition of “pattern of criminal gang activity” and appeared to accept that both an ordinary as well as a strict statutory definition would be acceptable. The learned judge held that:

I have had occasion previously, in *S v Peters and Another* (unreported judgment delivered on 4 November 2013 in case no. SS 17/2013), to remark on the difficulties inherent in the definition of ‘pattern of criminal gang activity’, which is used only in s 9(2)(a) of the Act and in the definition in s 1 of ‘criminal gang’. *It was found unnecessary in that case to resolve the difficulties; more particularly, whether the import of the term was comprehensively determined by the statutory definition, or whether it also bore the meaning denoted by the words making it up used in their ordinary sense.* The same situation applies in this case. In my judgment *the state failed to adduce evidence to prove a relevant ‘pattern of criminal gang activity’, whether in the defined sense of the term or the ordinary meaning of those words (...)*<sup>1069</sup>

Binns-Ward J did not explicitly make a finding and left the question open to other courts to interpret and resolve but did not reject the possibility of the definition also including “the meaning denoted by the words making it up used in their ordinary sense”. Such an approach is dangerous and could lead to great legal uncertainty.

These definitions in their current form endanger individual liberty by casting the criminal net too wide in that they make persons who do not strictly meet the definitional requirements susceptible to prosecution. Problems arise when these provisions do not meet the standards of either *ius certum* or *ius strictum*. The problems are furthermore not limited to the amount of predicate crimes required to form a pattern. If the aforementioned definitions are merely directory, then reference to Schedule 1 is

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<sup>1068</sup> Kruger *Organised Crime* 72.

<sup>1069</sup> *Jordaan* para 136 (own emphasis).

superfluous. Consequently, any common law or statutory crime may be used as a predicate crime. The requirement that these crimes be committed “within three years after a prior offence” would also not be necessary; and the requirement that the earliest offence must have occurred within ten years after a prior offence<sup>1070</sup> could also be considered to be an optional demarcation. Additional dangers arise when interpreting “criminal gang” through a directory lens. A criminal gang must be either a formal or informal *ongoing structure*. The words formal and informal are used to describe the phrase *ongoing structure*. If the structure is no longer required to be *ongoing*, it may form spontaneously or sporadically and then encroaches on the territory covered by the common purpose doctrine and thus rendering a substantial part of POCA Chapter 4 redundant. It would also be unnecessary to prove that this structure has an identifiable name or symbol. Requiring the criminal gang to form some type of structure, in other words, requiring some level of organisation, would also not be necessary. This is an untenable situation and implies an overbroad reach of POCA Chapters 1 and 4 which flagrantly offends the principle of legality.

### **5 3 2 2 3     *Ius praeivum***

*Ius praeivum* dictates that an accused may only be found guilty of a crime if the conduct was criminalised at the time that the criminal act was executed<sup>1071</sup> and this principle has been enshrined in section 35(3)(f) of the Constitution.<sup>1072</sup> Courts may thus not punish an act which has not previously been recognised as criminal conduct<sup>1073</sup> or find that an accused act that did not satisfy the definitional requirements of a crime, declare that a morally repugnant or “shocking” act to now be a crime.<sup>1074</sup>

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<sup>1070</sup> This raises yet another, separate legality issue – see below.

<sup>1071</sup> JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35.

<sup>1072</sup> Section 35(3)(f) of the Constitution states that every accused has the right to “not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted”. Also see JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35.

<sup>1073</sup> JM Burchell *South African Criminal Law & Procedure – Volume I: General Principles of Criminal law* (2011) 35.

<sup>1074</sup> See for example in *S v Von Molendorff and Another* 1987 (1) SA 135 (T) Ackermann J at 169 quotes the judgement in *R v M* 1915 CPD 334 (at 340), where Kotze J stated that:

The underlying rationale behind this principle is once again based in fairness and to allow the public to not traverse the line between legal and illegal conduct by providing them with appropriate forewarning as to what constitutes criminal behaviour.<sup>1075</sup>

One of the earliest forms of the prohibition against retrospectivity can be found in the *Corpus Iuris Civilis* and the *Digest*. The *Digest* expressed it as “[n]emo potest mutare consilium suum in alterius iniuriam”<sup>1076</sup> which means that “[n]obody can change his argument to the detriment of another”.<sup>1077</sup> More importantly, the *Corpus Iuris Civilis* stated the following:

*Leges et constitutiones futuris certum est dare formam negotiis, non ad facta praeterita revocari, nisi nominatim etiam de praeterito tempore adhuc pendentibus negotiis cautum sit.*<sup>1078</sup>

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Courts of law certainly discountenance anything immoral, but there are some acts of an immoral nature which they cannot reach and punish.... We do not possess the power of creating offences, upon the ground that, in our opinion, they are contrary to good morals.

Also see GP Kemp “*Nullum crimen sine lege*: ‘Hoe staan dit nou in ons reg?’” in Du Plessis & Lubbe (eds) *Man of Principle – The life and legacy of JC de Wet* (2013) 376 386-392 where the author refers to Snyman’s criticism of the *Masiya* judgement. Snyman argues that the Constitutional Court based their finding, at least partially, on emotional considerations of the “shocking facts”. See CR Snyman “Extending the Scope of Rape – A Dangerous Precedent” (2007) 124 *South African Law Journal* 677 680.

<sup>1075</sup> See *Savoi II* at paras 75-76 where Madlanga refers to comments made Blackstone in the 18<sup>th</sup> century regarding the unfairness and even cruelty of retrospective criminal provisions.

<sup>1076</sup> D 50.17.75.

<sup>1077</sup> A Fellmeth & M Horwit “*Nullus commodum capere (potest) de sua iniuria propria*” (2009) *Guide to Latin in International Law* <<http://www.oxfordreference.com.nwulib.nwu.ac.za/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-150>> (accessed 20-08-2018).

<sup>1078</sup> C 1.14.7.

This translates to:

It is clear that laws and constitutions create a rule for future cases and cannot be applied retroactively to past acts, unless provision has expressly been made concerning the past for acts that are still pending.<sup>1079</sup>

This sets out the principle that laws should only have future operation and do not have application to past events unless explicitly stated.<sup>1080</sup> Article 11(2) of Universal Declaration of Human Rights in 1948 stated that

[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

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<sup>1079</sup> BW Frier & FH Blume *The Codex of Justinian 3 Volume Hardback Set: A New Annotated Translation, with Parallel Latin and Greek Text* (2016) 261. Also see FH Blume "Book I. Title XIV: Concerning statutes, imperial constitutions and edicts" *UW Digital Libraries* <<http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/books/book1/book%201-14rev.pdf>> (accessed 29-10-2018).

<sup>1080</sup> See EE Smead "The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence" (1935-1936) 20 *Minnesota Law Review* 775 775-776.



Section 22(1) of the Rome Statute of the ICC, the International Covenant on ICCPR,<sup>1081</sup>, and national jurisdictions such as Germany<sup>1082</sup> are further examples of how the principle against retrospectivity finds expression.

*Ius praevium* has been expressed in case law as the prohibition against retrospective punishment. One must also distinguish between a statute that operates retrospectively and one that operates retroactively. The nuanced categories are distinguished as follows:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute

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<sup>1081</sup> Article 15(1) holds that

[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 15(1) further reads that

[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

This text is therefore substantially similar to the Universal Declaration of Human Rights. See *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Mazim Delić, Esad Landžo* IT-96-21-T (16 November 1998) para 352 for reference to Article 15.

<sup>1082</sup> Article 1 of the German Criminal Code. I will be relying on an English translation of the StGB, see M Bohlander “German Criminal Code” (10-10-2013) *Bundesministerium der Justiz und für Verbraucherschutz* <[http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0143](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0143)> (accessed 28-08-2017). The German text reads as follow: “Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde.”

was enacted. A retroactive statute changes the law from what it was; a retrospective [sic?] changes the law from what it otherwise would be with respect to a prior event.<sup>1083</sup>

POCA has already been subjected to constitutional attacks based on its apparent retrospectivity, but once again in the context of POCA Chapter 2. In *National Director of Public Prosecutions v Carolus and Others* (“*Carolus*”),<sup>1084</sup> Farlam AJA referred to the explicit retrospective nature of various chapters in POCA, including Chapter 4,<sup>1085</sup> thus removing any uncertainty regarding the matter. In the same case, the justice refers to the presumption against retrospectivity. This presumption dictates that the Legislature did not intend for a statute to function retrospectively, unless it is expressly rebutted or through clear interpretation.<sup>1086</sup> The Court refers to *R v Sillas*<sup>1087</sup> which highlights a mitigating practice in cases where a more severe punishment has been prescribed since the commission of the crime. This principle is now a constitutional right in terms of section 35(3)(n) of the Constitution.<sup>1088</sup>

This issue was more pertinently dealt with in the *Savoi II* where the Constitutional Court considered the matter of retrospectivity of Chapter 2 of POCA. The crux of this challenge was that one of the predicate racketeering offences could have been committed before the enactment of POCA and whether that renders Chapter 2 of POCA retrospective and thus unconstitutional.<sup>1089</sup> The Constitutional Court reaffirmed previous judgments on retrospectivity such as *Basson and Carolus*<sup>1090</sup> and Madlanga J even posited that a violation of the rule against retrospectivity would not only infringe on section 35(3)(l) of the Constitution but also the rights to freedom and security of the

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<sup>1083</sup> *National Director of Public Prosecutions v Carolus and Others* 1999 (2) SACR 607 (SCA) para 34, where the Court relies on Canadian authority – see EA Driedger “Statutes: Retroactive Retrospective Reflections” (1978) 56(3) *Canadian Bar Review* 264 268-269. Farlam AJA at para 35 states that retroactivity is used to describe retrospectivity in the “strong” sense and retrospectivity is used for retrospectivity in the “weak” sense.

<sup>1084</sup> 1999 (2) SACR 607 (SCA).

<sup>1085</sup> *Carolus* para [53].

<sup>1086</sup> *Carolus* para [31].

<sup>1087</sup> 1959 (4) SA 305 (A).

<sup>1088</sup> “Every accused has the right to a fair trial [including] (...) the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing [.]”

<sup>1089</sup> *Savoi II* [42].

<sup>1090</sup> See paras [74]-[76].

person contained in sections 12(1)(a)-(e).<sup>1091</sup> The justice importantly highlights the core of the rule against retrospectivity – that no criminal sanction must *flow* from acts that predate the enactment of a statute – and that was not the case in POCA Chapter 2.<sup>1092</sup>

Applying the definition and principles of retrospectivity to the definitions in POCA Chapter 1, it becomes clear that Chapter 4 operates retrospectively. If Mr X commits and is found guilty of several criminal acts listed in Schedule 1 of POCA since 1990, more criminal consequences are attached to his prior criminal acts committed since 1990 after the enactment of POCA than before it. In 1998, for example, his act of robbery (whether or not as a member of or in association with a criminal gang) was just an act of robbery but after 21 January 1999,<sup>1093</sup> it would also constitute a predicate act in terms of POCA. The only qualifier is that the last offence committed by the accused must occur within three years after a prior offence as required by section 1. This problem is intensified if one takes the abovementioned definitional *lacunae* into consideration. The State could rely on criminal acts stretching far beyond the maximum of three years between predicate acts if the definitions in section 1 are only directory. There is also no requirement that the underlying pattern of criminal gang activity be executed with the *mens rea* to benefit the gang.

But, if one follows the reasoning in *Savoi II*, this *prima facie* retrospectivity is remedied because a predicate act in itself does not give rise to the requisite pattern or criminal sanctions. Thus, it would seem, that although POCA Chapters 1 and 4 attach novel consequences to already-existing criminal acts, that something additional still has to be done before criminal sanctions arises and that sufficient forewarning has been given to allow citizens to adjust their conduct accordingly in order to avoid prosecution.

### **5 3 2 3      *Evaluation***

There is a clear and underlying principle throughout the discussion of the various facets of the principle of legality: there must be a proactive protection of the accused's

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<sup>1091</sup> The learned justice does not, however, expand on the assertion but it seems that only subsection (a) would be relevant where everyone has the right “not to be deprived of freedom arbitrarily or without just cause”.

<sup>1092</sup> *Savoi II* [80].

<sup>1093</sup> The date of commencement of POCA.

liberty when drafting statutes in order to provide fair warning and avoid arbitrary punishment. This conclusion is clear from the discussion above that Chapter 4, read with Chapter 1 of POCA, offends the *ius certum* and *ius praeivum* facets of the principle of legality. POCA has a retrospective operation by potentially relying on acts that took place before the enactment of POCA in 1999. The danger of this still occurring almost twenty years after the enactment of POCA is small but not impossible if one considers the broad interpretations of the definitions of “pattern of criminal gang activity” and “criminal gang” in Chapter 1. If it is accepted by courts that these definitions are merely directory, and thus in violation of the *ius strictum* facet, then the State could rely on historic criminal acts separated further in time despite section 1 requiring that “last of those [predicate] offences occurred within three years after a prior offence (...)”. Prescription under section 18 of the Criminal Procedure Act would then be the only restricting factor preventing the reliance on certain historic predicate acts outside the scope of the wording of the definition in POCA Chapter 1.<sup>1094</sup>

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<sup>1094</sup> Section 18 of the CPA states that

The right to institute a prosecution for any offence, other than the offences of

- (a) murder;
- (b) treason committed when the Republic is in a state of war;
- (c) robbery, if aggravating circumstances were present;
- (d) kidnapping;
- (e) childstealing;
- (f) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
- (g) genocide, crimes against humanity and war crimes, as contemplated in section 4 of the Implementation of the Rome Statute of the International Criminal Court Act, 2002;
- (h) any contravention of section 4, 5 or 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act 7 of 2013);
- (hA) trafficking in persons for sexual purposes by a person as contemplated in section 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
- (i) using a child or person who is mentally disabled for pornographic purposes as contemplated in sections 20 (1) and 26 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
- (j) torture as contemplated in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013),

It is difficult to speculate in the abstract whether the courts will adopt a directory and thus more flexible approach to the definitions in POCA section 1. If courts do indeed adopt such an approach, that approach will be a flagrant disregard for the *ius strictum* facet and not afford citizens appropriate forewarning or knowledge of the possible criminal sanctions. *Ius strictum*, as mentioned above, is the saving grace of the definitions in Chapter 1. A strict interpretation of these definitions would not violate these fundamental constitutional values.

### **5 3 2 4      *Foreign law***

#### **5 3 2 4 1      *USA***

The Californian Court of Appeals has ruled on several constitutional challenges to STEP. It is necessary to analyse these challenges in the light of the fact that STEP is the main legislative inspiration for Chapter 4 of POCA.

The constitutional challenges to STEP were mainly based on due process considerations in that the wording of the statute had a vague and/or overbroad application. Due process challenges are based on the Fifth Amendment<sup>1095</sup> (binding

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shall, unless some other period is expressly provided for by law, lapse after the expiration of a period of 20 years from the time when the offence was committed.

Therefore, most predicate crimes listed in Schedule 1 (see Addendum A of this dissertation) would prescribe after twenty years even if the definitions were considered to be directory. Note that at the time of the submission of this dissertation, the Constitutional Court in *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16 (14 June 2018) held that section 18 of the CPA was irritational, arbitrary and therefore unconstitutional due to the fact that it limited the scope of sexual offences that were subject to prescription. The order of constitutional invalidity was suspended for 24 months – giving the Legislature to amend the CPA in accordance with the judgement. During the remedial time provided to the Legislature, the words “and all other sexual offences whether in terms of common law or statute” should be read into section 18(f) after the words “the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively” (para 89).

<sup>1095</sup> The Fifth Amendment states that

the federal government) and Fourteenth Amendment<sup>1096</sup> (applicable to individual states) to the United States Constitution.<sup>1097</sup> These amendments function to protect individual liberty and require that the spheres of government to act within their conferred powers and provide just and fair procedures.<sup>1098</sup>

In *In re Alberto R. ("Alberto")*<sup>1099</sup> the Court stated that the requirements for a vagueness challenge founded in due process are twofold. The statute must firstly "be sufficiently defined to provide adequate notice of the conduct proscribed" and must secondly provide "sufficiently definite guidelines (...) to prevent arbitrary and discriminatory enforcement".<sup>1100</sup> The first requirement violates due process rights when persons with normal intelligence have to guess the meaning of a prohibition

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No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>1096</sup> Section 1 holds that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>1097</sup> Due process challenges differ from legality challenges in terms of South African law but these doctrines do appear to share common legal ancestry (see above) as well as substantive similarities. Features of the principle of legality are found in US law as a general, underlying principle of criminal law and does not appear to be as richly and independently developed as in South Africa. Wise notes that states have recently opted to incorporate facets of *ius acceptum* and *ius praeivum* in their state constitutions. The *ius strictum* facet, especially where judicial creation is prohibited, does not form part of the US constitutional doctrine but would still not be possible due to the restriction of the power vested in them by Congress, and state courts would thus be limited by due process considerations. See EM Wise "Criminal Law" in Clark & Ansay (eds) *Introduction to the Law of the United States* (2002) 139 140-141.

<sup>1098</sup> P Strauss "Due Process" *Wex Legal Library* <[https://www.law.cornell.edu/wex/due\\_process](https://www.law.cornell.edu/wex/due_process)> (accessed 03-11-2015).

<sup>1099</sup> 235 Cal.App.3d 1309 (1991).

<sup>1100</sup> *Alberto* 1316.

proscribed in a statute.<sup>1101</sup> There is also an underlying argument based on personal autonomy: statutes have to be drafted in clear terms so that citizens may freely choose whether to obey or disregard them.<sup>1102</sup> If not drafted clearly, it takes away this autonomy and may “trap the innocent”.<sup>1103</sup> Vague and overbroad statutes may conversely also cause law abiding citizens to refrain from exercising their constitutionally protected freedoms in order to avoid prosecution.<sup>1104</sup> The second consideration prevents the application of arbitrary and subjective punishment by the State and juries.<sup>1105</sup>

With regards to broadness, the Court observed that the broadness and vagueness doctrines were “logically related”.<sup>1106</sup> The prohibition on overbroad statutes is based on similar considerations as the vagueness doctrine whereby, in terms of *NAACP v. Alabama*,<sup>1107</sup> a statute is so overbroad that it *substantially*<sup>1108</sup> invades the sphere of protected individual liberties. The Court relied on *United States v. Petrillo*<sup>1109</sup> and states that the constitutional standard requires that the relevant conduct be proscribed in a fashion that gives adequate warning to those affected by it “when measured by common understanding and practices”.<sup>1110</sup> Bjerregaard notes that courts should apply heightened scrutiny when applying the vagueness doctrine to situations where constitutionally protected behaviour may be limited, such as freedom of association when criminalising gang activity.<sup>1111</sup>

The most efficient way to illustrate the development of the constitutional jurisprudence relating to the development of STEP is to provide a review of the most seminal judgments.

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<sup>1101</sup> *Alberto* 1316.

<sup>1102</sup> *Alberto* 1316.

<sup>1103</sup> *Alberto* 1316.

<sup>1104</sup> *NAACP v. Button* 371 U.S. 415 (1963) 433. Also see B Bjerregaard “The Constitutionality of Anti-Gang Legislation” (1998) 21(1) *Campbell Law Review* 31 33.

<sup>1105</sup> *Alberto* 1316.

<sup>1106</sup> *Alberto* 1316 referring to *Kolender v. Lawson* 461 U.S. at p. 359, 103 S.Ct. at p. 1859, fn. 8.).

<sup>1107</sup> 377 U.S. 288 (1964), as referred to in *Alberto* 1316.

<sup>1108</sup> See *Broadrick v. Oklahoma* 413 US 601 (1973).

<sup>1109</sup> (1947) 332 U.S.

<sup>1110</sup> *United States v. Petrillo* (1947) 332 U.S.; *Alberto* 1317.

<sup>1111</sup> Bjerregaard (1998) *Campbell Law Review* 33.



### 5 3 2 4 1 1 *Vagueness and overbreadth: Application in case law*

STEP has been subjected to several constitutional challenges based on the alleged vagueness of certain key definitions. The appellant in *Alberto R.* challenged the relevant provisions in STEP on several grounds. It was argued that the sentence enhancing provisions in section 186.22(b) were unconstitutionally vague; were overbroad in his case and consequently violated his due process rights by not providing fair notice of the criminalised conduct, equal protection and freedom of association rights.<sup>1112</sup>

This attack was directed at numerous phrases of the relevant provisions. The Court rejected the contention that the term “benefit of” was ambiguous because it would include instances of non-monetary benefit while the legislature could only have intended it to include monetary benefits.<sup>1113</sup> Huffman J accurately pointed out that the legislature had used terms such as “profits” and “proceeds” in the same text to indicate monetary benefits and would have done the same if it was applicable to the impugned instance. Furthermore, words and phrases must be interpreted with reference to their qualifying language which contextualises it and limits its scope.<sup>1114</sup> Vagueness and overbreadth are avoided in this instance due to the qualifying words “with the specific intent to promote, further, or assist in any criminal conduct by gang members (...)”.<sup>1115</sup> The appellant’s additional contention that an accused would be subjected to arbitrary enforcement based on the decision of whether the gang’s “primary activity” is social or criminal as required by STEP, was also addressed by the Court.<sup>1116</sup> It responded by stating that the Act clearly lists which conduct is prohibited and the State furthermore has to provide evidence that the primary activity of the group falls within the prohibited conduct as per STEP.<sup>1117</sup> It could also be phrased that the Act provides adequate warning to members of the public which equips them with adequate knowledge in order to avoid prosecution. The additional claim that the phrase “active participation in criminal gang activity” was overbroad, was also dismissed by the Court.

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<sup>1112</sup> *Alberto* 1315.

<sup>1113</sup> *Alberto* 1322.

<sup>1114</sup> *Alberto* 1322.

<sup>1115</sup> *Alberto* 1322.

<sup>1116</sup> *Alberto* 1322.

<sup>1117</sup> *Alberto* 1322.

The requirements in STEP limit the application thereof to situations where alleged gang members intentionally further the objectives of the gang and to gang members that in fact know of the criminal conduct.<sup>1118</sup> Only those persons would face prosecution. The Court ultimately rejected all of the contentions made by the appellant and furthermore asserted that the language used by the legislature protected his right to freedom of association and that the subsection did not offend the doctrines against overbreadth and vagueness.<sup>1119</sup>

The appellant in *People v. Green* (“*Green*”),<sup>1120</sup> argued that section 186.22 of STEP was so vague that it did not provide the public with adequate notice of the prohibited conduct and as a result led to arbitrary enforcement.<sup>1121</sup> It was argued that the vagueness of the subsection and resultant uncertainty also created the danger that legitimate and protected activities fell within the ambit of the statute which caused it to be impermissibly overbroad and thus unconstitutional in its application.<sup>1122</sup> The appellant attacked the terms “active participation” and “members” for being constitutionally uncertain. The Court firstly dismissed the challenge to “member” (or “membership”) because it is a word with ordinary meaning under the common law and has also been judicially interpreted to be “a relationship to an organization that is not accidental, artificial or unconsciously in appearance only”.<sup>1123</sup> Case law has also shown that that a member must actively contribute to the activities of the (criminal) organisation by contributing all or a substantial part of his time to it – and not merely be a technical, nominal or passive member.<sup>1124</sup> Stein AJ pointed out that the Californian Legislature had opted to use terminology similar to the approach under the common law through the use of the phrase “active participation”. It was further posited that this terminology is analogous to “active membership” under the common law and thus fringe members would not fall within the ambit of the subsection. Thus, relying on the common law requirements for active membership, the Court concluded that the members of the public would not be the victim of arbitrary law enforcement or that the

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<sup>1118</sup> *Alberto* 1324.

<sup>1119</sup> *Alberto* 1324.

<sup>1120</sup> 278 Cal.Rptr. 140 (1991).

<sup>1121</sup> *Green* 694.

<sup>1122</sup> *Green* 694.

<sup>1123</sup> *Green* 699 referring to *Galvan v. Press* 347 U.S. 522 (1954).

<sup>1124</sup> *Green* 699-700 referring to *Scales v. United States* 367 U.S. 203 (1961).

law would similarly afford insufficient notice to them.<sup>1125</sup> The Californian Legislature then intervened and inserted a provision overruling this provision.<sup>1126</sup> The California Supreme Court however overruled this “substantial time” interpretation in *People v. Castenada* (“*Castenada*”)<sup>1127</sup> by stating that all that has to be proved is that the defendant’s active participation has been “more than nominal or passive”.<sup>1128</sup>

The Court similarly rejected the claims of the appellants against the term “membership” stating that although it may not be precisely defined or definable, absolute certainty of its meaning is not required. The contention that fringe members will be subjected to prosecution was rejected by Stein AJ because these members were not in danger of being prosecuted. More than mere membership is required under section 186.22.<sup>1129</sup> Section 186.22 also withstood an attack on the required knowledge of a pattern of criminal gang activity. The Court was not convinced by the contention that an accused could be convicted based on gossip of his alleged knowledge that the impugned group was involved in a pattern of criminal gang activity. Knowledge means “awareness of the particular facts proscribed in criminal statutes”<sup>1130</sup> and this awareness must relate to the listed crimes under subsection 186.22(e).<sup>1131</sup> This line of reasoning is bolstered with reference to RICO case law where a court in *United States v. Campanale*<sup>1132</sup> held that the term “pattern of racketeering activity” would be “unmanageable” were it not for the definition and closed list of crimes relating to it.<sup>1133</sup>

The additional attack to the term “criminal street gang” was considered as meritless by the Court. The appellant’s reliance on a New Jersey State Supreme Court decision in *Lanzetta v. New Jersey*<sup>1134</sup> was not adequate considering the differences between

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<sup>1125</sup> *Green* 700.

<sup>1126</sup> Section 186.22(i). Also see See Schloenhardt *Organised Crime Offences* (2009) 256.

<sup>1127</sup> 97 Cal.Rptr.2d 906 (2000). See M Baker “Stuck in the Thicket: Struggling with Interpretation and Application of California’s Anti-Gang Step Act” (2006) 11 *Berkeley Journal of Criminal Law* 101 109.

<sup>1128</sup> See *Castenada* 910-913.

<sup>1129</sup> *Green* 700. Some additional act of furtherance, promotion, assistance is required.

<sup>1130</sup> Stein AJ referring here to *People v. Lopez* (1986) 188 Cal.App.3d 592.

<sup>1131</sup> *Green* 702-703.

<sup>1132</sup> (9th Cir.1975) 518 F.2d 352.

<sup>1133</sup> *Green* 702.

<sup>1134</sup> 306 U.S. 456.

the two statutes.<sup>1135</sup> The Court rather relied on previous judgments based on the RICO statute and asserted that the term “enterprise” in terms of RICO was similar to that of “gang” under STEP and that the Courts have not had difficulty interpreting the former term.<sup>1136</sup>

### **5 3 2 4 2      Canada**

The definition of “criminal organization”<sup>1137</sup> and the provision relating to the commission of offences by a criminal organization<sup>1138</sup> in the Code have also been subjected to constitutional scrutiny. Vagueness was once again central to these challenges. The leading authority for the application of the vagueness doctrine in terms of Canadian constitutional law can be found in the *Nova Scotia* judgment.<sup>1139</sup> The Supreme Court of Canada highlighted that a vagueness challenge can be raised both under sections 7 and 1 of the Canadian Charter of Rights and Freedoms (“the Charter”). A statute may firstly be challenged under section 7 as a matter of fundamental justice which requires laws to not be impermissibly vague. A challenge may additionally be raised under section 1 *in limine*. The basis for this challenge is, in order for Charter rights to be limited, the limitation has to be prescribed law – but in cases of vagueness the limiting instrument is so vague, that it does not meet the requirement of it being prescribed law.<sup>1140</sup> The doctrine, like in South African and US law, is based in the rule of law requiring fair notice be provided to citizens. According to Gonthier J in *Nova Scotia*, a court will have to consider a trilogy of factors in its determination of whether a law is impermissibly vague: firstly, the need for flexible legislation which can adapt to various factual scenarios and cognisance for the interpretative function of the courts, next the fact that absolute certainty cannot be achieved but, in its place, “a standard of intelligibility” is favoured, lastly the Court also recognised that various judicial interpretations can and may exist and coexist, which

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<sup>1135</sup> See *Green* 702.

<sup>1136</sup> Stein AJ in *Green* 702 relied on *U.S. v. Perholtz* (D.C.Cir.1988) 842 F.2d 343 and *United States v. Turkette* (1981) 452 U.S. 576. Section 186.22, to substantiate this assertion.

<sup>1137</sup> Section 467.1(1) of the Code.

<sup>1138</sup> Section 467.1(12) of the Code.

<sup>1139</sup> And has approvingly been relied on in South African constitutional jurisprudence (see 7 3 1 1).

<sup>1140</sup> *Nova Scotia* 626.

does not necessarily lead to a conclusion of vagueness.<sup>1141</sup> The fundamental test for vagueness under *Nova Scotia* is whether a law is so vague that it does not produce an adequate basis for legal debate. In other words, one cannot elucidate the meaning of the law through the application of reasoned analysis of legal criteria.<sup>1142</sup> It does not provide fair notice to citizens or curb enforcement discretion by law enforcement agencies by delineating the area of risk a statute is proscribing.<sup>1143</sup> Although the aforementioned test may sound abstract, the analysis must also be contextualised through the subject matter, *boni mores*, the related legislative provisions and former judicial interpretation.<sup>1144</sup>

Overbreadth is separate and distinct from the vagueness doctrine under Canadian law.<sup>1145</sup> As stated in *R v Zundel* (“*Zundell*”):<sup>1146</sup>

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.<sup>1147</sup>

The Court in *Nova Scotia* was however clear in that overbreadth had no independent existence in Canadian constitutional law and was merely an “analytical tool”.<sup>1148</sup> This notion has however been challenged in subsequent decisions applying overbreadth

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<sup>1141</sup> *Nova Scotia* 627.

<sup>1142</sup> *Nova Scotia* 639-640.

<sup>1143</sup> *Nova Scotia* 639.

<sup>1144</sup> *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (“*Pacific*”) para. 47, referred to by Mackenzie J in *Terezakis* para 23.

<sup>1145</sup> The Court in *Nova Scotia* emphasised the fact that the doctrine of vagueness and overbreadth are to distinct, yet sometimes overlapping doctrines. The Court also pointed out that these doctrines seem to intertwine in American constitutional litigation.

<sup>1146</sup> (1987) 58 O.R. (2d).

<sup>1147</sup> *Zundell* 129 157-158; approvingly relied on by *Nova Scotia* at 130.

<sup>1148</sup> *Nova Scotia* 632. This is also the case in South African constitutional law. In *Savoi II* 31 the Constitutional Court said that:

In our constitutional jurisprudence overbreadth is not a self-standing ground of statutory constitutional invalidity. It comes into the equation of general application has been found to limit a right in the Bill of Rights in the justification analysis in terms of section 36(1) of the Constitution once a law of general application has been found to limit a right in the Bill of Rights.

as an independent doctrine under section 7 of the Charter and, and where it was stated that it involves balance between state interest and individual liberty.<sup>1149</sup> The test for overbreadth is whether the specific means employed (such as legislation) are necessary and consequently do not go beyond what is necessary in order to achieve the desired state interest.<sup>1150</sup>

The relevant provisions of the Code were also unsuccessfully attacked on the grounds that they violated the fair trial rights in terms of sections 7 and 11(d) of the Charter, as well as rights of freedom of association in terms of section 2(d).

### **5 3 2 4 2 1    *Application in case law***

In *Lindsay 2004* Fuerst J had to address a three-pronged constitutional challenge to subsections 467(1) and 467(12) of the *Code* based on contentions that the provisions were vague, broad and/or did not meet the constitutional standard for the requisite minimum level of *mens rea*.<sup>1151</sup> It was additionally alleged that section 467(14) constituted cruel and unusual punishment, thus violating section 12 of the Charter by imposing a mandatory consecutive sentence and removing the judicial discretion of setting an appropriate sentence.<sup>1152</sup> In dealing with the overbreadth challenge to the definition of “serious crime”, the Court pointed out that legislators cannot envisage every scenario that the legislation may have to address,<sup>1153</sup> thus requiring it to be drafted in broad terms. The Court held that the definition of “serious offence” did not constitute overbroad drafting. This definition, based on the wording in the Palermo Convention,<sup>1154</sup> is sufficiently defined in the *Code* and does not punish non-criminal or recreational group conduct. The tentacles of organised crime structures furthermore require a myriad of predicate activities to be criminalised – even

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<sup>1149</sup> The Court in *Lindsay 2004* admitted to the doctrines being distinct but stated, in contrast to *Nova Scotia*, that both vagueness and overbreadth could form the basis for a section 7 Charter challenge. See *Lindsay 2004* at para 35.

<sup>1150</sup> *Lindsay 2004* para 37.

<sup>1151</sup> See *Lindsay 2004* paras 11-14.

<sup>1152</sup> *Lindsay 2004* para 66. This challenged was not analysed by the Court. Fuerst J found that the matter was not ripe to be addressed by the Court yet. See *Lindsay 2004* para 66-68.

<sup>1153</sup> *Lindsay 2004* para 41.

<sup>1154</sup> Article 2(b) of the Palermo Convention.

those that are not *prima facie* associated with organised crime such as hazardous waste disposal – thus rendering a closed list of offences impracticable.<sup>1155</sup>

The Court also did not agree with the allegations of vagueness, specifically with regard to the definitions of “criminal organization” and the term “in association with”. Fuerst J conceded, as stated with overbreadth above, that legislators are necessitated to draft legislation in wider and consequently vaguer terms due to the impossibility of legislating every factual scenario. The task of clarifying and interpreting that necessarily vague legislation is the task of the courts but this does not translate to it being unconstitutionally vague.<sup>1156</sup> The components of the “criminal organization” definition<sup>1157</sup> all had accepted definitions and had been interpreted by case law, thus avoiding the alleged vagueness and uncertainty.<sup>1158</sup>

Addressing the *mens rea* challenge, it was stated that moral blameworthiness as an element of criminal liability was a constitutional requirement under section 7 of the Charter.<sup>1159</sup> The Court acknowledged that some form of subjective *mens rea* is the preferred form of liability especially for crimes that carry a significant amount of stigma or severe punishment, although there are statutory instances where faultless liability can occur.<sup>1160</sup> Analysing section 467(12), the Court found that subjective *mens rea* is required for several aspects before the Crown can secure a conviction. It has to prove *mens rea* for the predicate offence(s) and that the accused acted for “benefit of, at the direction of, or in association with a criminal organization”. The Court approved the Crown’s assertion that there was an implied requirement to be read into the definition: the accused must commit a predicate offence with the intent to benefit, at the direction of, or in association with a group, knowing that the group was a criminal organization. It is however not required that the accused know the identities of the members of the organization.<sup>1161</sup>

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<sup>1155</sup> *Lindsay 2004* para 44. See 5 3 2 2 1 above where similar observations were made with regard to POCA.

<sup>1156</sup> *Lindsay 2004* para 55.

<sup>1157</sup> The Court focussed on the terms “common objective”, “commission”, “facilitate”, and “material benefit”.

<sup>1158</sup> *Lindsay 2004* paras 56-60.

<sup>1159</sup> *Lindsay 2004* para 61, relying on *R. v. Ruzic*, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1.

<sup>1160</sup> *Lindsay 2004* paras 62-63.

<sup>1161</sup> *Lindsay 2004* para 64.



In *Terezakis*<sup>1162</sup> the Court of Appeal for British Columbia addressed a previous finding that the instructing offence in terms of section 467(13) of the (read with the definition of “criminal organization” in subsection 467(1)) was unconstitutionally vague and overbroad.<sup>1163</sup> The phrase “group, however organized”, according to the court *a quo*, was “so vague as to constitute no meaningful guidance”<sup>1164</sup> or alternatively that it almost boundlessly overbroad.<sup>1165</sup> The concerns of the judge of the court *a quo*, where the risk of prosecuting persons that do not share the same criminal objective as those who do, were reasoned away by Mackenzie J. Only members of an organisation who share and execute the common criminal activity will face prosecution and not those who are part of the organisation but only form part of an innocent purpose of said organisation. The reasoning of the trial court was consequently rejected where it was posited that even persons that are aware of the criminal activities and purpose, but do not participate, would be liable for prosecution.<sup>1166</sup> Mackenzie J pointed out that a wide legislative net had to be cast in order to prosecute participants in a criminal organisation. This is due to the fact these groups do not conform to formal or traditional legal structures but the wording of the provisions do not endanger non-participants in the criminal organisations.<sup>1167</sup> Subsections 467(11)-(12) do not require the accused to be part of the criminal organisation. The so-called “participation offence” (section 467(11)) only requires the participation “in activities that enhance the ability of the organization to commit or facilitate an indictable offence” coupled with the requisite *mens rea*.<sup>1168</sup> The “commission offence” (section 467(12)) requires that there be a link between the criminal organisation and indictable offence.<sup>1169</sup>

An issue that was not addressed by the court *a quo*, was the alleged violation of the freedom of association by sections 467(11)-(13) of the Code. The respondent based this attack on the wording “has as one of its main purposes or main activities the facilitation or commission of one or more serious offences” because under the

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<sup>1162</sup> 2007 BCCA 384. Appealing- from the Supreme Court of British Columbia in *R. v. Accused No. 1 et al.*, 2005 BCSC 1727 (“*Accused*”).

<sup>1163</sup> *Terezakis* para 1.

<sup>1164</sup> *Accused* at 130; *Terezakis* at 16.

<sup>1165</sup> *Accused* at 130; *Terezakis* at 16.

<sup>1166</sup> *Terezakis* para 32.

<sup>1167</sup> *Terezakis* para 34.

<sup>1168</sup> *Terezakis* para 35.

<sup>1169</sup> *Terezakis* para 35.

definition, not all parties to the organisation have to share the criminal purpose or engage in the criminal activity to be subjected to prosecution.<sup>1170</sup> For similar reasons as outlined above, the Court also rejected this attack. The instructing offence under section 467(13) requires that the alleged criminal leader to have the requisite knowledge of the main criminal activities or purpose of the organisation for the instruction to fall within the scope of the offence. In a similar vein, subsections 467(11) and (12) require that the actors possess knowledge of a relationship between the criminal activity and criminal organisation. Merely associating with the organisation is not illegal in itself.<sup>1171</sup> It was additionally submitted by the Crown that the trial judge erred in asserting that there is a risk of including fringe members of the criminal organisation. Mackenzie J agreed and stated that this strains the plain meaning of the text.<sup>1172</sup> Furthermore, the scope of the instruction offence is limited by the required *mens rea* of the instructor. The instructor must know that they are part of the criminal organisation and that the instruction is connected to said organisation; consequently limiting the scope of subsection 467(13) and rescuing it from unconstitutional vagueness or overbreadth. Due to this *mens rea* requirement, unconnected persons to the organisation are not at risk of prosecution as well.<sup>1173</sup>

### **5 3 2 5      *Evaluation***

Many of the themes present in the constitutional litigation against Chapter 2 POCA are present in the cases brought against the US and Canadian statutes.

The Californian Legislature has gone to great lengths to protect anti-gang legislation from constitutional scrutiny. It is however undeniable that there is a tension between the interest of the state and community and the rights of (potentially) accused persons. The state, on the one hand, wants to cast a wide criminal net in order to capture undeniably far-reaching criminal networks. This necessitates drafting statutes in (somewhat) vague terms. This wide criminal net, however, potentially infringes upon the constitutional rights of accused persons or the very least persons whom the legislation might affect.

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<sup>1170</sup> Terezakis para 44.

<sup>1171</sup> Terezakis para 44.

<sup>1172</sup> Terezakis paras 38-39.

<sup>1173</sup> Terezakis paras 42-43.

Bjerregaard highlights the difficulties of drafting this type of legislation in such a way as not to infringe on the constitutionally protected freedoms of the accused, and states that there are three main strategies that have been employed to avoid said vagueness.<sup>1174</sup> Freedom of association violations are avoided by requiring active participation and not mere membership as well as requiring knowledge of the criminal street gang's criminal activities.<sup>1175</sup> This requirement (mostly) excludes fringe members and one-time or unknowing participants from being prosecuted. STEP also sets a strict intent requirement by necessitating that the accused have the intent to "promote, further or assist the criminal conduct of the gang". The final strategy is the Californian legislature's narrow definitions of certain key terms.<sup>1176</sup> This is certainly true if one considers the case law above. The Californian courts have gone to great lengths to limit the scope of the definitions of STEP and, as far as possible, leave very little room for vagueness, ambiguous interpretation or overbreadth. This was apparently not the approach of the South African legislature when it opted to draft open-ended language for Chapter 4 of POCA.

Baker also points out that STEP has no definition for "gang member" even though there are several references to the term throughout STEP. There is no uniform interpretation of this term by the courts and law enforcement agencies and the author argues that uncertainty regarding this term renders the entire statute vague and unconstitutional but can be saved by legislative intervention.<sup>1177</sup> This *lacuna* has been carried over into the wording of STEP and creates the same danger, especially considering the problems pointed out in 5 3 2 2 2 and 5 3 2 2 3.

The Canadian Code offers its own set of problems because of its unique "instruction offence" aimed at the leaders of criminal organisations and by not requiring formal membership in order to be convicted of the offences, which is usually the case with organised criminal group statutes. This is however remedied by the various *mens rea* requirements. The leader must possess knowledge of the main criminal activities or the purpose of the organisation; that they are part of the "organization" (and not necessarily a member) and that the instruction is connected to the organisation.

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<sup>1174</sup> B Bjerregaard "The Constitutionality of Anti-Gang Legislation" (1998) 21(1) *Campbell Law Review* 31 34.

<sup>1175</sup> Bjerregaard (1998) *Campbell Law Review* 34.

<sup>1176</sup> Bjerregaard (1998) *Campbell Law Review* 34.

<sup>1177</sup> See Baker (2006) *Berkeley Journal of Criminal Law* 109-112.

Something that is apparent, especially in the Canadian constitutional litigation, is that the tentacles of organised crime groups are far-reaching and require more flexibility than other statutes. Non-conformation with traditional or formal legal structures further complicates matters – thus requiring dynamic legislation which can be applied to a myriad of different factual scenarios. Similar sentiments were expressed by the South African Constitutional Court in *Savoi II*.<sup>1178</sup> This then justifies broader and vaguer definitions which still adhere to constitutional standards. Burchell's critique against statutorily criminalising criminal gang activities becomes very relevant here.<sup>1179</sup>

#### 5 4 The freedom of association

Legislation criminalising the participation in certain associations should necessarily involve a constitutional analysis, as the freedom of association is protected by section 18 of the Constitution. There has been repeated reference throughout this dissertation that the Legislature and the Judiciary should be vigilant with respect to the potential impact of the constitutional freedom of association.<sup>1180</sup> The ensuing section will analyse the South African and US positions regarding the freedom of association in the context of anti-gang legislation.

##### 5 4 1 *South African perspective*

POCA Section 10(3) might violate an accused person's freedom of association by using the mere fact of gang membership as an aggravating circumstance for purposes of sentencing for offences that might not even be gang-related. The section states that:

If a court, after having convicted an accused of any offence, other than an offence contemplated in this Chapter, finds that the accused was a member of a criminal gang at the time of the commission of the offence, such finding shall be regarded as an aggravating circumstance for sentencing purposes.

Anti-gang legislation avoids freedom of association challenges by requiring gang-related offences to be coupled with a *mens rea* requirement or by requiring active

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<sup>1178</sup> See paras 22-24.

<sup>1179</sup> See Burchell *Principles* 909-910, as well as 1 3 1, 3 1, 5 3 2 1 1 as well as 5 4 1 fn above.

<sup>1180</sup> See for example 1 6, 3 3 5, 4 2, 4 5 1-2, 5 1 as well as the preceding sections above.

participation in a criminal gang.<sup>1181</sup> Here, in terms of section 10(3), a Court may consider a person's gang membership as an aggravating circumstance even when sentencing an unrelated offence that he or she has committed in their personal capacity. In these circumstances, *mens rea* is completely absent.

Section 18 of the Constitution guarantees the right to freedom of association and simply and broadly states that "[e]veryone has the right to freedom of association".<sup>1182</sup> Article 10(1) of the ACHPR is more restrictive in its wording by stating that an individual has a "(...) right to free association provided that he abides by the law". The members of a criminal organisation are therefore, in principle, protected as long as they do not *actively* participate in the conduct of the criminal gang.

The ECHR is more expansive in its delineation of the freedom of association (which is amalgamated with the freedom of assembly).<sup>1183</sup> Article 11(2) however prohibits restrictions on the exercise of these rights

(...) other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.<sup>1184</sup>

This conditional right is congruent with article 9(2) of the Basic Law of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) 1949 ("*Grundgesetz*").<sup>1185</sup> Article 9(2) however goes further and holds that

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<sup>1181</sup> See Bjerregaard (1998) *Campbell Law Review* 34 and discussion above.

<sup>1182</sup> This is similar to section 2 the Canadian Charter which merely states that "[e]veryone has the following fundamental freedoms (...)" and includes freedom of association fourth on the list in section 2.

<sup>1183</sup> Article 11(1) states that

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

<sup>1184</sup> Article 11(2) further states that it "shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State".

<sup>1185</sup> See Tomuschat C, Currie DP & Kommers DP "Basic Law for the Federal Republic of Germany" (23-12-2014) *Deutscher Bundestag* <<https://www.btg-bestellservice.de/pdf/80201000.pdf>> (accessed 27-11-2017) for an official translation.

[a]ssociations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.

There is a slight textual but ultimately significant difference between these two texts. The ECHR limits the exercise of right if the limitation is required “for the prevention of disorder or crime”. A criminal group would then not be deserving of the right to freely associate. Article 9(2) of the *Grundgesetz* however places a blanket prohibition on associations aimed at criminal activities or violation of the constitutional order. Merely having this criminal aim is therefore sufficient to warrant constitutional exclusion.

The ACHPR, ECHR and the *Grundgesetz* provide some illustration as to the content of associational protections considering that section 18 of the South African Constitution is considerably vague in its wording. Only the ACHPR has persuasive or binding value as South Africa is a party to it. The ACHPR is congruent with the ECHR and *Grundgesetz* albeit not as strict as the latter.

A paradox may arise when interpreting whether section 10(3) complies with the ACHPR. Individuals, under the ACHPR, have the right to free association on the condition that they “abide by the law”. The only logical conclusion would be that a person would not receive associational protection if, in the exercise of their associational freedoms, he or she contravened the law; then such a person would not deserve protection. A person who is subject to a sentence increase under section 10(3) did contravene the law – but they *did not contravene the law for or with their association*. Their increased sentence is therefore irrational and arbitrary as there is no link between increased punishment *merely* because someone is a gang member – without the crime being linked to gang activities. This was the exactly the case in the state of Tennessee in the USA, which abolished a similarly-worded statute. The judgment will be discussed in the subsequent section.

Woolman has contemplated whether criminal organisations are deserving of constitutional protection under section 18. The author seemingly does not agree – and argues that the outlawing of criminal associations would be uncontroversial.<sup>1186</sup> He submits, firstly, that criminal organisations do not normally seek to enhance “civil society or any of the macrosocial ends” which are characteristic of legitimate,

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<sup>1186</sup> S Woolman “Freedom of Association” in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 06-08) 44.3-2

noncriminal associations.<sup>1187</sup> Woolman submits, next, that one has to ask whether a criminal law is an impediment to the right to freely associate and then provides responses to this dilemma if the answer is in the affirmative. Associations whose sole purpose is to subvert should not deserve protection unless the association is challenging a criminal law and therefore advocating for change.<sup>1188</sup> Further, organisations are deserving of constitutional protection, when they are “intimately linked to the exercise of other fundamental rights” such as the freedom to assemble, demonstrate, picket and petition;<sup>1189</sup> facilitate labour relations – <sup>1190</sup> to name only a few.<sup>1191</sup> A final saving grace would be to exclude criminal associations on a case-by-case basis and let them potentially be saved by section 36 of the Constitution.

Despite the views of Woolman, which are largely supported by Cheadle et al,<sup>1192</sup> it is submitted that the increased sentence of a gang member merely due to his

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<sup>1187</sup> Woolman “Freedom of Association” in *CLOSA* 44.3-2.

<sup>1188</sup> Woolman “Freedom of Association” in *CLOSA* 44.2-2.

<sup>1189</sup> Section 17 of the Constitution.

<sup>1190</sup> Section 23 of the Constitution, which, *inter alia*, provides for the right to strike in terms of section 23(2)(c). See generally Woolman “Freedom of Association” in *CLOSA* 44.2-1-44.2-12.

<sup>1191</sup> Other rights include dignity (section 10); privacy (section 14); religion or belief (section 15); freedom of expression (section 16); language and cultural rights (section 30 and 31) – MH Cheadle, DM Davis & NRL Haysom in *South African Constitutional Law: The Bill of Rights* (SI 23 2017) 13-3.

<sup>1192</sup> See Cheadle et al *Bill of Rights* 13-7 especially. The authors do however criticise Woolman’s “loose concept” of criminal associations. They are uncertain whether the organisation’s objectives must be criminal in nature or the character of the individuals concerned. It is unclear to this author what Cheadle et al mean by “criminal character” – does it potentially refer to the fact that someone is a habitual criminal? Someone’s “criminal character” is procedurally and constitutionally problematic – with reference to the evidentiary rules providing for the exclusion of character evidence as well as evidence pertaining to previous convictions and similar fact evidence. The topic of the use of previous convictions and similar fact evidence was discussed in depth in this Chapter.



*association* with a gang and not because of his actual participation or personal guilt in gang-related activity is untenable. There is an absence of an additional requirement linking the crime that the accused has committed to the gang membership and therefore renders this offence indefensible in light of section 18 of the Constitution. Over and above violating free association, section 10(3) also violates one of most basic tenets of criminal law – the principle of individual criminal responsibility.<sup>1193</sup>

The following section shall investigate how US and Canadian courts have dealt with possible free association violations posed by anti-gang legislation. The discussion, over and above reference to STEP, will however include a particularly instructive judgment made in the US state of Tennessee which struck down a statute with similar wording to section 10(3) of POCA.

## 5 4 2 USA

The issue of freedom of association was addressed in *People v. Rodriguez* (“*Rodriguez*”)<sup>1194</sup> in considering the constitutionality of section 186.22(a) (the substantive provision) of STEP. The Californian Supreme Court here relied heavily on jurisprudence of the United States Supreme Court. The latter court in *Scales v. United States* (“*Scales*”)<sup>1195</sup> addressed the constitutionality of a provision of the Alien Registration Act 367 18 U.S.C. (commonly known as “the Smith Act”)<sup>1196</sup> which

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Also in question is whether, based on this loose concept, an outlawed criminal association accused of relatively trivial crimes (such as persons who have defaulted on their municipal rates or hawkers accused of illegally trading) would also be denied their right to assemble to challenge their criminal status. The authors submit that the focus of *their* inquiry would be rather in terms of the limitations clause, rather than limiting the content of the right itself. Further, they refer to the availability of common law measures such as conspiracy or common purpose to prosecute them. Woolman responds to this by stating (amongst other things) that the one must be circumspect in relegating the entire enquiry as to the potential unlawfulness of an association to the limitation phase. The author also disagrees with Cheadle et al’s characterisation of his concept of a criminal organisation as “loose” and correctly holds that the purpose of the associations mentioned are different: the unlawful hawkers or defaulters are a criminal association and acts where they engage in or plan these activities may fall under common law measures such as common purpose and conspiracy. See Woolman “Freedom of Association” in *CLOSA* 44.2-3 fn 12.

<sup>1193</sup> See also 3 2 and 3 3 6 2 3 above.

<sup>1194</sup> 55 Cal.4th 1125 (2012).

<sup>1195</sup> 367 U.S. 203 (1961).

<sup>1196</sup> § 2385.

criminalised membership of organisations “advocating the overthrow of the government by force or violence”.<sup>1197</sup> There, Harlan J stressed the importance of the principle of personal guilt affirmed in US jurisprudence, in line with the Fifth Amendment to the United States Constitution.<sup>1198</sup> Criminal sanction will only be justifiable when there is a “sufficiently substantial” connection between the status of a person (as a member of an organisation) and their conduct and other criminal conduct.<sup>1199</sup> The provision of the Smith Act ultimately survived the attack under the Fifth Amendment because the Supreme Court held that the statute only targeted active members, accompanied by the requisite “guilty knowledge and intent” of the members of the vexed organisation and not members who may only be sympathetic to the cause of an alleged criminal organisation.<sup>1200</sup>

The Californian Supreme Court also referenced its previous judgment in *People v. Mesa* (“*Mesa*”)<sup>1201</sup> where the careful phrasing of the Californian Legislature was highlighted. *Mesa* held that the Legislature intended that only active participation, together with knowledge about the activities of the criminal organisation and with the intent to further that the criminal activities of that organisation; or instances where there is wilful promotion, furtherance or assistance in those criminal activities, would incur criminal liability.<sup>1202</sup>

From this jurisprudence, it appears that a statute such as STEP (or the now-repealed Smith Act), shall pass constitutional muster if it (a) does not punish mere membership or association, (b) the accused must actively (c) carry out some (criminal) act in furtherance of the criminal conduct of the vexed group and (d) do so with guilty intent as well knowledge of the group’s conduct.

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<sup>1197</sup> *Rodriguez* 1149.

<sup>1198</sup> *Scales* 224.

<sup>1199</sup> *Scales* 224-225; *Rodriguez* 1149 relying on *Scales*.

<sup>1200</sup> *Scales* 228; *Rodriguez* 1149.

<sup>1201</sup> 54 Cal.4th 191 (2012).

<sup>1202</sup> *Mesa* 196-197. Also see *People v. Gardeley* 14 Cal.4th 605 (1996) at 624-625 where the Californian Supreme Court held that STEP

does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only “for the benefit of, at the direction of, or in association with” a group that meets the specific statutory conditions of a ‘criminal street gang,’ but also with the ‘specific intent to promote, further, or assist in any criminal conduct by gang members.’”

The Californian enhancement, as illustrated above,<sup>1203</sup> differs substantially from the enhancement under section 10(3) of POCA. Californian courts have repeatedly interpreted this enhancement to have distinct requirements that have to be fulfilled before the enhancement may be applied.

A more apt comparison is the Tennessee Code (2012) section 40-35-121. The structure and text of the code is substantially similar to POCA and employs enhanced sentencing in certain circumstances. This provision was challenged in 2015 and considered by the Tennessee Court of Criminal Appeals in *State of Tennessee v. Devonte Bonds, Thomas Bishop, Jason Sullivan, and Brianna Robinson* (“*Bonds et al*”).<sup>1204</sup> Section 40-35-121(b) was challenged on the basis that it violated the defendant’s substantive due process rights.<sup>1205</sup> This section stated that

[a] criminal gang offense committed by a defendant who was a criminal gang member at the time of the offense shall be punished one (1) classification higher than the classification established by the specific statute creating the offense committed.

This provision is therefore identical in substance to section 10(3) of POCA which enhances a sentence based on mere gang membership.

The arguments relating to the sentence enhancement can be summarised as follows: the sentence enhancement would apply irrespective of knowledge, control or consent to the activities of the other members of the criminal gang. Unlike the enhancement provision in STEP, the State did not have to prove “that the offenses committed by others w[ere] committed for the benefit of, at the direction of, or in association with any criminal street gang”.<sup>1206</sup> There was furthermore no requirement that the crimes that were committed by gang members were gang-related – only that the crimes were committed by gang members. Thus, the defendants correctly submitted that a person would receive enhanced punishment for being a gang member without in fact having contributed to that gang in any fashion. He or she could therefore be punished merely because of the criminal acts of other members of the gang in

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<sup>1203</sup> See 4 5 3 above.

<sup>1204</sup> Tenn. Crim. App. (2016). The defendants raised several substantive and procedural issues but the issue that will be discussed here is the sentence enhancements as per section n 40-35-121 of the Tennessee Code.

<sup>1205</sup> *Bonds et al* 40.

<sup>1206</sup> *Bonds et al* 40.

instances where the underlying crime is not of a gang-related nature and therefore based on mere association.<sup>1207</sup>

The defendants relied on a similar case decided by the Florida Supreme Court in *State v. O.C.* ("O.C.").<sup>1208</sup> There, the Court held that the sentence enhancement in terms of section 874.07 of the Florida Statute (1996) was unconstitutional. The Supreme Court of Florida held that the Statute was punishing mere association because an accused could face increased punishment, even in instances where the membership (or association) with the gang *had nothing to do with the underlying crime that was being enhanced* due to gang membership.<sup>1209</sup> The Court found that the effect of section 847.04 was irrational on several grounds. It was held that it lacked a nexus between the criminal acts of the accused and his or her gang membership and furthermore that there was no rational relationship between the sentence enhancement and the (legitimate) legislative goal of curbing gang violence. This consequently fell short of the constitutional standard of a "(...) 'reasonable and substantial' relation to a permissible legislative objective".<sup>1210</sup>

The Tennessee Court of Criminal Appeals, after careful consideration of the above authority and an analysis of other US states utilising sentence enhancements for gang-related offences,<sup>1211</sup> concluded that the omission of a nexus between gang-related

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<sup>1207</sup> *Bonds et al* 40.

<sup>1208</sup> 748 So.2d 945 (1999).

<sup>1209</sup> O.C. 950; *Bonds et al* 42.

<sup>1210</sup> O.C. 950; *Bonds et al* 42. The Court in *O.C.* is quoting a previous judgement of the Florida Supreme Court in *State v. Saiez* 489 So. 2d 1125 (1986) ("*Saiez*") holding that due process must have a "reasonable and substantial relation" to the object of the statute and said statute must furthermore also not be "unreasonable, arbitrary, or capricious". See *Saiez* 1128.

<sup>1211</sup> The Court referred to statutes of Georgia, Ohio, Indiana and California. These sentence enhancing statutes were all challenged on constitutional grounds but each survived their respective challenges. The common theme amongst these statutes was a nexus between the enhancement and *personal involvement* in the activities of a criminal gang. In *Rodriguez v. State* 284 Ga. 803 (2009) at 810, for example, the Supreme Court of Georgia held, quoting *State v. Walker* 506 N.W.2d 430 (1993) at 433, that

[t]o support a conviction, the accused must be shown to have conducted or participated in criminal street gang activity through the commission of "an actual criminal act. Mere association is insufficient."

activity (the legitimate governmental purpose) and the sentence enhancement was “constitutionally fatal” as it did not fulfil the intended governmental purpose at all.<sup>1212</sup> The only objective that was achieved, was the “harsher treatment of criminal offenders who also happen to be members of a criminal gang.”<sup>1213</sup>

Considering this body of foreign law finding a substantially similar statute to be unconstitutional, the next step is to evaluate whether the relevant provisions of POCA are justifiable under section 36 of the Constitution.

#### 5 4 3 *Limitations clause: Section 36 of the Constitution*

An analysis under the limitations clause was conducted in Chapter 3 where the constitutionality of the common purpose doctrine was considered.<sup>1214</sup> The enquiry here turns to the statutory context.

The first factor is the importance and purpose of the limitation. The limitation must serve some sort of (governmental) purpose.<sup>1215</sup> It was illustrated above that the common purpose doctrine aims to address the “significant societal scourge” of group criminality by relieving the evidentiary burden of the State from having to prove the causation element. Whether one agrees with the *manner* in which this goal is achieved or not, one cannot argue that the goal is illegitimate. The ostensible goal of section 10(3) is enhancing the sentences of gang members for, one would hope, gang-related crimes. This then serves as a deterrent and possibly also prevention (albeit only while the gang member is incarcerated) of a gang member from re-offending soon after conviction. A final goal may then also be unadulterated retribution against someone

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In *State v. Williams* 773 N.E.2d 1107 (2002) (at 1012), the Ohio Court of Appeals held that the statute requires active membership as well as guilty knowledge by said members. These requirements preclude guilt by mere association.

<sup>1212</sup> *Bonds et al* 44.

<sup>1213</sup> *Bonds et al* 44.

<sup>1214</sup> See 3 3 7 above.

<sup>1215</sup> See Currie & De Waal *Handbook* 166.

for *being* a gang member or *associating* with gang members. Such unadulterated retribution also does not “promote the spirit, purport and object of the Bill of Rights”.<sup>1216</sup>

The following factor, namely the relationship between the limitation and the purpose,<sup>1217</sup> goes hand-in-hand with the prior factor. As we have seen above, the Tennessee Court of Criminal Appeals found that there was no relationship between the legitimate governmental purpose in curbing gang-related crimes and the sentence enhancement. There was no “reasonable and substantial” relation between the enhanced punishment and committing a crime that had nothing to do with a person’s gang involvement. The Tennessean statute, just like section 10(3) of POCA, would apply regardless of whether there was any type of knowledge, control or consent by the other members of the gang. The crime is completely unrelated to the conduct of the gang. Burchell described this type of punishment, albeit in a different context,<sup>1218</sup> as “the worst excesses of guilt by association”.<sup>1219</sup> This is exactly what it is: a mere association with a gang, without some evidence of being a formal gang member, makes one liable for increased punishment.

Deterrence or prevention is further not attained when the crime in question does not have to be gang-related. This author fails to see how, as ridiculous as the example might be, the governmental objectives would be attained by increasing the sentence of a gang member who has violated, for instance, the National Road Traffic Act 93 of 1996. The person may not even be a gang member by choice. It was pointed out in Chapter 2 that (especially younger) people often have to join gangs in order to survive or are forced or manipulated to do so.<sup>1220</sup> Section 10(3) is therefore not only legally

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<sup>1216</sup> Section 39(2) of the Constitution. Also see 5.1 above. See for example Chaskalson J’s comments in *Makwanyane* (para 129) on the retribution as a reason for the death penalty. The learned justice questions strong reliance thereon in a constitutional era and stated that it carried less weight than deterrence. Earlier in the judgement, he also quotes the following passage from *S v J* 1989 (1) SA 669 (A) (para 682):

Generally speaking, however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the ‘essential’, ‘all important’, ‘paramount’ and ‘universally admitted’ object of punishment.

<sup>1217</sup> Section 36(1)(d) of the Constitution.

<sup>1218</sup> In the context of the common purpose doctrine.

<sup>1219</sup> Burchell *Principles* 909.

<sup>1220</sup> See 2.2.

but morally indefensible and should not survive constitutional scrutiny – even under section 36.

The US approach is preferred where actual knowledge and intent to further the gang's objectives is required.

## 5 5 Chapter overview

The preceding sections show a troubling trend of statutory uncertainty and overbroad application. Although it can be argued that the constitutional scale may be tipped in favour of the protection of the inhabitants of the State, it should not eviscerate constitutional protections of the accused. Amendments to the text of POCA is required to bring it in line with the principle of legality as well as the freedom of association are required.<sup>1221</sup>

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<sup>1221</sup> See 7 2 for the proposed amendments.



## Chapter 6

# Considering alternative measures addressing gang activity:

## Foreign and international law perspectives

### 6 1 Constitutional framework and introduction

It was illustrated in Chapter 5 that the Constitution places certain interpretative instructions or imperatives on courts, tribunals and forums (simply referred to as forums) when interpreting the Bill of Rights. The overarching interpretive instruction is that these forums “*must* promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.<sup>1222</sup> These forums *must* then also consider international law;<sup>1223</sup> while they *may* consider foreign law.<sup>1224</sup> Section 39(2) furthermore places a duty on courts to “promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation or developing the common law. The last important interpretative imperative is “the democratic values of human dignity, equality and freedom”.<sup>1225</sup>

This Chapter will investigate foreign and international mechanisms in dealing both with organised crime as well as holding leadership figures in hierarchal criminal structures responsible for their contributions to the unlawful actions of their subordinates. The purpose of this analysis is firstly to consider possible alternatives or supplementary measures to South Africa’s current legislative regime in dealing with criminal gang activities. The preceding chapters have outlined several institutional, substantive and constitutional problems in dealing with criminal gang activities. Foreign models and their implementation will be analysed but importantly also whether they are appropriate in our jurisdiction as they give rise to *other* institutional, substantive and constitutional concerns.

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<sup>1222</sup> Section 39(1)(a) (own emphasis).

<sup>1223</sup> Section 39(1)(b) (own emphasis).

<sup>1224</sup> Section 39(1)(c) (own emphasis).

<sup>1225</sup> Sections 1 and 7 of the Constitution.

## 6.2 Considering the rationale for punishment of leaders in hierarchal structures

What exactly is the rationale and benefit of investigating additional or alternative models for the punishment of gang leaders? POCA Chapter 4 has no express provision pertaining to gang leaders. The closest provision is section 9(2)(b) which criminalises the inducement to contribute to a pattern of criminal gang activity.<sup>1226</sup> This provision has an extremely weak maximum sentence of three years (or a fine)<sup>1227</sup> for this crime. The sentence is aggravated to a maximum of five years if committed within 500 metres of a school or educational institution.<sup>1228</sup> Section 2(1)(f) criminalises the management of an “enterprise” within the meaning of section 1 of POCA. Securing a conviction for this offence may prove to be evidentially complex as certain elements have to be proven.<sup>1229</sup>

Liability for leaders or criminal masterminds under the common law is also problematic because liability can only ensue where the accused’s active and/or direct involvement (as a leader-*cum*-instigator, leader-*cum*-conspirator or party to a criminal endeavour under the common purpose doctrine) can be proven.<sup>1230</sup> The liability under these forms is harsher because the punishment is usually equal to physical or actual perpetration.<sup>1231</sup> But this may be justifiable as will be illustrated below. The scheme under POCA similarly requires an active and/or direct contribution to be proven by the State.

The problem in holding leaders of criminal organisations or criminal gangs liable lies mostly in proving their direct involvement with the crimes committed by subordinates lower in the hierarchal chain of command or even in the absence of such a “formal” chain of command. The leader is too far removed from the actual perpetration of the crime. Neha points to this problem under international criminal law and the difficulties faced by tribunals. The problem is in fact two-fold: holding an individual responsible for crimes committed as “part of a collective criminal project”

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<sup>1226</sup> See 4.5.2.5 above.

<sup>1227</sup> Section 10(1)(b) of POCA. See 4.5.3.1 above.

<sup>1228</sup> Section 10(1)(b) read with sections 10(1)(d) and 10(2). See 4.5.3.1-4.5.3.2 above.

<sup>1229</sup> See above at 4.4 for a more comprehensive discussion on these provisions.

<sup>1230</sup> See the discussion at 3.3-3.5 above.

<sup>1231</sup> See Chapter 3 above.

and furthermore, justifying labelling that person as a perpetrator despite the fact that he or she did not carry out any part of the wrongful act.<sup>1232</sup> These are the identical problems the State and the courts face in holding gang leaders responsible for their crimes. In order to circumvent this issue, several doctrines under international law as well as in foreign jurisdictions<sup>1233</sup> have developed to hold the commanders or superiors in a military relationship or leaders of criminal organisations responsible for the crimes committed by their subordinates. Again, it is noted here that it is not this author's contention that the doctrines of international criminal law are directly applicable to any of the crimes under POCA as they are presently constructed. The aim here is to see how modes of liability and justifications for punishment of leadership crimes under international criminal law and selected foreign law can help us to better understand possible weaknesses in and potential ways to reform South African criminal law.

There are strong justifications for holding gang leaders responsible for the actions of their subordinates. While it is clear that leaders of criminal gangs should be held responsible for their role in ordering, instructing or masterminding criminal endeavours, there is also motivation for *further, additional or harsher* punitive sanctions for their role in a criminal gang. Commentators have argued that leaders of criminal organisations cannot be treated as regular instigators because subordinates cannot "substantially deviate" from the instructions of the leader.<sup>1234</sup> A harsher punishment should therefore be imposed due to this power the leader wields over the subordinate.

Moral blameworthiness also plays a significant role. Eldar points to an apparent legal intuition by holding that the conduct of the leader is undoubtedly more reprehensible.<sup>1235</sup> The author refers to the trial of Adolf Eichmann, a Nazi official. There it was posited that criminal responsibility in fact *increases* further away from the actual

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<sup>1232</sup> J Neha "The Control Theory of Perpetration in International Criminal Law" (2011) 12(1) *Chicago Journal of International Law* 159 161-162.

<sup>1233</sup> Such as Germany and Canada.

<sup>1234</sup> See T Weigend "Perpetration through an Organization: The Unexpected Career of a German Legal Concept" (2011) 9 *Journal of International Criminal Justice* 91 102-103.

<sup>1235</sup> H Silving *Constituent elements of crime* (1967) 147; S Eldar "Punishing Organized Crime Leaders for the Crimes of their Subordinates" (2010) 4 *Criminal Law and Philosophy* 183 183-184.

perpetrator and higher up the organisational ladder to the so-called masterminds.<sup>1236</sup> This intuition may be founded in the retribution theory of punishment. This theory requires that an offender be punished for their acts and thus receives their just deserts for acting outside of the law.<sup>1237</sup> Although this theory still enjoys widespread public favour, it has become fallen out of favour in academic and criminological spheres due to the appropriate move towards movements such as restorative justice.<sup>1238</sup> Incidental to this retributionist argument, is that the contribution of leaders of organisations should not be relegated to that of a mere accessorial or conspiratorial nature.<sup>1239</sup>

A lack of capacity and coercion is a further justification for punishing the leaders of criminal organisations more severely than the actual perpetrators. In relationships where there is a power imbalance and where there is a presence of coercion to execute certain criminal orders, the subordinate may lack the capacity to act autonomously and freely.<sup>1240</sup> South African law has recognised that coercion through an imbalanced relationship of power may have an influence on the capacity of a perpetrator.<sup>1241</sup> Other authorities however argue the counterpoint: that criminal

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<sup>1236</sup> Eldar (2010) *Criminal Law and Philosophy* 184 referring to *Attorney General v. Eichmann* (1961) Criminal Case No. 40/61 (“*Eichman*”) at 197. Also see *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 (30 September 2008) (“*Katanga & Chui*”) (at para 503) referring to the *Eichmann* case.

<sup>1237</sup> WR Laffave & AW Scott Jr *Handbook on Criminal Law* (1972) 24. Also see CR Snyman *Criminal Law* 6 ed (2015) 11-20 for a review of the theories of punishment.

<sup>1238</sup> Kemp et al *Criminal Law* 22. Also see Snyman *Criminal Law* 11-15 and discussion above at 4 5 3 4.

<sup>1239</sup> See F Muñoz-Conde & H Olasolo “The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain” (2011) 9 *Journal of International Criminal Justice* 113 115; 134.

<sup>1240</sup> Eldar (2010) *Criminal Law and Philosophy* 185. See also *Katanga & Chui* at para 495; See G Werle & F Jessberger *Principles of International Criminal Law* 3 ed (2014) 239-244 for the grounds under international criminal law for excluding criminal law.

<sup>1241</sup> Kemp et al *Criminal Law* 182-183. The author refers here to the presumption of coercion applying in favour of a child offender. The State will consequently have to prove that the child had the ability to resist the compulsion or coercion of the older person exercising his or her influence over the child. This must of course be understood in the context of the criminal capacity of a child, especially in light of the Child Justice Act 75 of 2008. In the context of gangs, the court in *S v Bradbury* 1967 (1) SA 387 (A) however (at 404) held that

organisations often operate on the basis of positive, rather than negative, reinforcement and thus act akin to legitimate organisations.<sup>1242</sup> Japanese triads such as the Yakuza act within a paradigm of extreme cohesion. In eighteenth-century Japan, the unique relationship between Yakuza leaders and subordinates, known as *oyabun-kobun* (which translates literally into “father-role/child-role”) was common and continues to exist.<sup>1243</sup> Standing refers to the internal contradiction within criminal

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[a]s a general proposition a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence or fear as an extenuation. But each case must be judged on its own facts.

Although the Appellate Court did admit here to the fact that each case must be judged on its own facts, the general rule holds that an accused cannot escape liability or claim extenuating circumstances when he or she “voluntarily and deliberately becomes a member of a criminal gang” knowing the murderous practices or policies of that gang. The *locus classicus* for compulsion in South African law is however *S v Goliath* 1972 (3) SA 1 (A) (“*Goliath*”). The crux of the judgement, for purposes of this dissertation, is that compulsion can be used as a complete defence, even in relation to a charge of murder. The facts of each case will however have to be judged on its own merits. Human beings cannot be held to the highest ethical standards or ideals and favour the life of one above that of another. The Court pointed out that it is accepted that the average person will consider their own lives as more important and are not expected to act like heroes. (*Goliath* especially at 21 and 25-26). See further Burchell *Principles* (2016) 174-178; JRL Milton “Recent cases” (1967) 84 *South African Law Journal* 121 145-148.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, albeit in a different context, recognises a power imbalance as a factor that would exclude sexual consent. Section 1(3)(b) states that

Circumstances in subsection (2) in respect of which a person ('B') (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5 (1), 6 and 7 or any other act as contemplated in sections 8 (1), 8 (2), 8 (3), 9, 10, 12, 17 (1), 17 (2), 17 (3) (a), 19, 20 (1), 21 (1), 21 (2), 21 (3) and 22 include, but are not limited to, the following:

(...)

where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act [.]

<sup>1242</sup> Eldar (2010) *Criminal Law and Philosophy* 185. Also see DC Smith “Organized crime and entrepreneurship” (1978) 6 *International Journal of Criminology and Penology* 161.

<sup>1243</sup> DE Kaplan & A Dubro *Yakuza: the explosive account of Japan's criminal underworld* (1987) 18-19. Also see Eldar (2010) *Criminal Law and Philosophy* 185-186.

gangs because they often try to function both as a family as well as a business.<sup>1244</sup> The author furthermore points to Paoli who submitted that gangs sometimes fall within the “clan model” which operates like a family with an emphasis on loyalty.<sup>1245</sup>

Claus Roxin’s theory of indirect perpetration through a criminal organisation,<sup>1246</sup> seems to have found favour at the ICC and compliments the aforementioned “lack-of-autonomy doctrine”. The central idea of the theory is that a subordinate is merely a cog in the criminal machinery of the leader and is the “intellectual author alongside the perpetrator at the heart of the events”.<sup>1247</sup> The subordinate in this scheme is thus almost dehumanised and the leader is placed central in the sequence of criminal events. One can also view this to mean that the only actor of relevance is the leader and that the interchangeable, replaceable or even “fungible” subordinates of the criminal organisation are of no significance in the context of criminal sanction. The implementation of the criminal plan will therefore not be foiled by the failure of one subordinate to execute that plan.<sup>1248</sup>

There is a strong legal as well as moral basis (founded in public opinion) for the more severe punishment of leaders in a criminal gang. The section below will investigate the models and protocols particularly employed under international law as a possible solution to the doctrinally problematic solutions under POCA and the

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<sup>1244</sup> A Standing *Organised crime: A study from the Cape Flats* (2005) 70. Also see Levitt S & Venkatesh SA “Are we a family or a business?” History and disjuncture in the urban American street gang” (2000) 29 *Theory and Society* 427 427-462. The authors at 428 refers to a meeting of members of the Black Kings Nation gang. A member posited the question, “Are we a family or a business?”. Levitt & Venkatesh then point towards the differences in the institutional approaches of these units. A family would focus more on cohesion and have a disdain for interfamilial competition among the members. On the other hand, if they consider them to be (more of) a business, than these relationships would be of secondary importance and competitiveness is promoted such as with certain leaders encouraging and incentivising higher drug sales by subordinate gang members. Also see 6 4 2 4 2 below for a discussion of the power dynamics and familial structure of gangs.

<sup>1245</sup> Standing *Cape Flats* 74; L Paoli “Criminal Fraternities or Criminal Enterprises?” in P Williams P & D Vlassis (eds) *Combating Transnational Crime. Concepts, Activities and Responses* (2001) 88-108.

<sup>1246</sup> See C Roxin *Täterschaft und Tatherrschaft* 8 ed (2006).

<sup>1247</sup> Roxin *Täterschaft* (2016) 245; quoted in *Katanga & Chui* para at para 515. See Eldar (2010) *Criminal Law and Philosophy* 186. The author here is not in favour of this theory because it is posited that it does not withstand scrutiny due to a lack of empirical data supporting it. See also F Jessberger & J Geneuss “On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at The Hague?” (2008) 6 *Journal of International Criminal Justice* 853 860.

<sup>1248</sup> See *Katanga & Chui* para 516.

common law as well as the unsatisfactory punishment scheme – especially under POCA.

### 6 3 Overview of regional and international instruments addressing organised and transnational crime

Before specific models are analysed, relevant regional and international instruments which provide the theoretical basis for the proposed alternative models, will be discussed.

#### 6 3 1 *The Malabo Protocol*

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“Malabo Protocol”) was adopted<sup>1249</sup> in Malabo, Equatorial Guinea, at the African Union’s Assembly of Heads of State and Government in 2014.<sup>1250</sup> The criminal jurisdiction of the African Court of Justice and Human and People’s Rights (“ACJHPR”) (“the African Court”) proposes a broad range of crimes enumerated in article 28A. The jurisdiction is substantially broader than the core crimes of the ICC which hears matters of crimes against humanity, crimes of aggression, war crimes and genocide.<sup>1251</sup> As of August 2018, eleven states have signed the Protocol. South Africa has not signed the Protocol and there are no ratifications yet. The Protocol has not yet come into force.<sup>1252</sup>

While the ICC is mainly focused on the most serious crimes under international law, namely genocide, crimes against humanity, the crime of aggression and war crimes, the proposed African Court will also deal with transnational economic crimes (such as money laundering, drug trafficking and corruption) as well as crimes such as the illicit exploitation of natural resources, trafficking in persons as well as trafficking in

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<sup>1249</sup> Decision on The Draft Legal Instruments Doc. Assembly/AU/8(XXIII).

<sup>1250</sup> See Amnesty International *Malabo Protocol: Legal and Institutional Implications of The Merged and Expanded African Court* (2016); A Abass “Historical and Political Background to the Malabo Protocol” in Werle & Vormbaum (eds) *Malabo Protocol* (2017) 11 11-13.

<sup>1251</sup> Article 5(1) of the Statute of Rome.

<sup>1252</sup> Article 11(1) of the Malabo Protocol. See African Union “List of Countries which have Signed, Ratified/Accessed to The Protocol on Amendments to The Protocol On The Statute Of The African Court of Justice and Human Rights” (14-08-2018) [https://au.int/sites/default/files/treaties/7804-sl-protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_5.pdf](https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf) (accessed 14-08-2018).



hazardous waste. Other crimes include terrorism, piracy, “mercenarism” and the crime of unconstitutional change of government. The crime of unconstitutional change in government, for example, has been described as peculiar to the African continent<sup>1253</sup> and it can thus be successfully argued that the establishment of an African criminal court is necessary in this context as it seeks to address continental problems which fall outside of the limited substantive jurisdiction of the ICC. The criminal jurisdiction shall also not remain static and may be extended, through consensus<sup>1254</sup> by the State parties, to reflect changes in international law.<sup>1255</sup> Such extension must always be done with due cognizance of the principle of legality, especially the *ius praevium* doctrine. The crimes enumerated in Article 28 shall also not be subject to prescription.<sup>1256</sup> The common theme to these crimes, is that most of them (if not all) have a strong transnational characteristic and to a large extent have “intractable connections”.<sup>1257</sup>

The Malabo Protocol has no express crime relating to the participation in an organised criminal group despite the fact that it contains offences such as money laundering and drug as well as human trafficking, which are predominantly carried out by organised syndicates.

The Malabo Protocol will be discussed further below in the context of the general principles concerning command responsibility.

### 6 3 2      *The Rome Statute of the International Criminal Court*

The Rome Statute of the International Criminal Court (“the Statute of Rome”) was adopted on the 17<sup>th</sup> of July 1998, creating the first permanent international criminal court.<sup>1258</sup> The court has, as mentioned above, jurisdiction over the most serious

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<sup>1253</sup> See Abass “Background to the Malabo Protocol” in Werle & Vormbaum (eds) *Malabo Protocol* (2017) 18.

<sup>1254</sup> The term “consensus” is not defined in the Malabo Protocol itself.

<sup>1255</sup> Article 28A(2) of the Malabo Protocol.

<sup>1256</sup> Article 28A(3) of the Malabo Protocol.

<sup>1257</sup> Amnesty International *Malabo Protocol* (2016) 16.

<sup>1258</sup> See Article 1 of the Rome Statute; International Criminal Court “Understanding the International Criminal Court” *International Criminal Court* <<https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>> (accessed 29-07-2017).

international crimes – specifically crimes against humanity, war crimes, the crime of aggression and genocide.<sup>1259</sup>

## 6 4 Modes of responsibility flowing from these instruments

### 6 4 1 *The doctrine of command responsibility*

The focus of this section will be Article 28 of the Rome Statute. Article 28 provides for the so-called doctrine of command and superior responsibility.<sup>1260</sup> It is however imperative that this doctrine first be contextualised both historically and developmentally to obtain a comprehensive interpretive background.

#### 6 4 1 1 *Introduction*

The doctrine of command responsibility has been applied in international tribunals to attribute responsibility to leaders of military and civil organisations for the actions of their subordinates.<sup>1261</sup> Just as with the leaders of criminal organisations and gangs, it becomes increasingly difficult to hold a commander responsible for acts carried out by his or her subordinates due to the lack of physical participation in the crime. More specifically in the instance of commanders, is the imposition of responsibility to prevent instances of acquiescence in the face of atrocities occurring under their control.<sup>1262</sup>

The most recent applications are at the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda as well as proceedings before the International Criminal Court.<sup>1263</sup> Although it appears that some scholars believe that the earliest manifestation of the doctrine appeared during the Nuremberg trials which were held between 1945 and 1946, its roots go much further back.<sup>1264</sup> An Ordinance of Charles VII of France in 1439 proclaimed that captains and lieutenants are to be held

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<sup>1259</sup> Article 5 of the Statute of Rome read with Article 6 (“Genocide”), Article 7 (“Crimes against humanity”), Article 8 (“War crimes”) and Article 8 *bis* (“Crime of aggression”).

<sup>1260</sup> These terms shall be used interchangeably throughout the text.

<sup>1261</sup> AM Danner & JS Martinez “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law” (2004) 93 *California Law Review* 75.

<sup>1262</sup> See Werle & Jessberger *Principles of International Criminal Law* (2014) 221-222.

<sup>1263</sup> M Markham “The Evolution of Command Responsibility in International Humanitarian Law” (2011) *PSJIA* 52; 54-56.

<sup>1264</sup> See LC Green “Command Responsibility in International Law” (1995) 5 *Transnational Law & Contemporary Problems* 319 320-321.

responsible for the “abuses, ills and offences” of members of their company. “Responsible”, in this context, does not mean “liable” in a criminal law context. The word seems to allude that the captains and lieutenants must exercise control over their subordinates and are responsible in an employee-employer fashion and must facilitate punishment to “bring the offender to justice” for misdeeds committed under the control of the superior. The Ordinance however goes further in stating that in the case of the offender escapes and evades punishment, the captain shall be deemed to have committed the act himself and be liable for the punishment as *if* he had committed it himself.<sup>1265</sup> Grotius also spoke of a principle reminiscent of command responsibility, stating, in 1615, that “(...) he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime”.<sup>1266</sup> These justifications are thus in harmony with the justifications in holding leaders of criminal organisations, as described above, responsible for their actions.

Van Sliedregt notes the post-World War II (“WW II”) emergence of command or superior responsibility as an independent doctrine outside of its original application within military practice.<sup>1267</sup> These WW II cases started to delineate three “constitutive elements” of command responsibility, namely a functional element; a cognitive element and an operational element.<sup>1268</sup> The author notes that these elements were originally codified in terms of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (“Protocol I”), of 8 June 1977.<sup>1269</sup> Article 86(1) places a positive duty to act on parties to the conflict to prevent “grave breaches” and take necessary measures to suppress such breaches or breaches of the Convention or the Protocol. Article 86(2) stipulates that superiors would not be absolved from breaches of the Convention or the Protocol if the superior knew or had information to his disposal which would have equipped him

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<sup>1265</sup> See T Meron *Henry's Wars and Shakespeare's Laws* (1994) 149 (originally quoted in LG de Vilevault & L Brequigny *Ordonnances Des Rois De France De La Troisième Race* 306 (1782)); Green (1995) *Transnational Law & Contemporary Problems* 321.

<sup>1266</sup> SC Neff *Hugo Grotius on the Law of War and Peace: Student Edition* (2012) 293.

<sup>1267</sup> E van Sliedregt “Article 28 of The ICC Statute: Mode of Liability and/or Separate Offense?” (2009) 12 *New Criminal Law Review* 420 421.

<sup>1268</sup> Adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3. See Van Sliedregt (2009) *New Criminal Law Review* 421 as well as A Cassese *International Criminal Law* 2 ed (2003) 208 where the author refers to “cumulative conditions”.

<sup>1269</sup> Van Sliedregt (2009) *New Criminal Law Review* 421.

at the time to conclude that a subordinate was committing or planning to commit such a breach and furthermore did not take “feasible measures within their power to prevent or repress the breach.” Article 87(3) also states that

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Other instruments have recognised an obligation of superiors towards their subordinates but did not stipulate any criminal consequences due to non-compliance.<sup>1270</sup> Article 86(2) was therefore an innovation in this regard.

The doctrine is a departure from the traditional dictates of criminal law where no liability attaches to omissions. The point of departure is that only positive acts attract criminal sanction. Only in exceptional circumstances, as necessitated by the legal convictions of the community, will omissions be punishable. Criminal liability for omissions will only ensue where there is a legal duty to act.<sup>1271</sup>

It must be borne in mind that this section is by no means an attempt to give a comprehensive discussion of the superior or command responsibility: that is well beyond the scope of this study. The goal of this section is however to identify general principles of superior and command responsibility for potential adoptability as a mechanism to hold the leaders of criminal gangs responsible by imputing a legal duty to act on such leaders. This is especially relevant in situations where the size and organisational structures of criminal gangs resemble military or quasi-military hierarchical entities not dissimilar from what one would encounter in more formal military settings.

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<sup>1270</sup> For example, Article 1 of The Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910); Article 43 of the Protocol I as well as Article 39 of Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135. See Y Sandoz, C Swinarski & B Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) at 3540.

<sup>1271</sup> Burchell *Principles* 51-52; 78.

## 6 4 1 2      **General principles**

Article 7(3) of the ICTY Statute states that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

A virtually identical provision is found in the ICTR Statute.<sup>1272</sup>

There are three elements, as noted above, that must be satisfied to incur criminal liability under this doctrine. The functional element entails a form of “effective command, control or authority” over the persons (perpetrators) committing the actual crimes.<sup>1273</sup> Cassese refers to the ICTY appeal in *Prosecutor v Delalić and others*<sup>1274</sup> where the Appeals Chamber confirmed the finding by the Trial Chamber<sup>1275</sup> where it was held that *de facto* control or authority was sufficient to satisfy this element.<sup>1276</sup> Formal appointment is thus not required. This is reminiscent of the management requirement under Chapter 2 of POCA where the manager of the enterprise does not have to be formally appointed in terms of South African labour law to satisfy the requirement.<sup>1277</sup>

The Appeals Chamber also endorsed the view of the Trial Chamber that a civilian could also incur criminal liability under article 7(3). The Trial Chamber found that there

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<sup>1272</sup> Article 6(3) of the ICTR Statute states that

[t]he fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

<sup>1273</sup> Cassese *International Criminal Law* (2003) 208.

<sup>1274</sup> IT-96-21-A (20 February 2001) (“*Delalić Appeal*”).

<sup>1275</sup> *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Mazim Delić, Esad Landžo* IT-96-21-T (16 November 1998) (“*Delalić Trial*”).

<sup>1276</sup> Cassese *International Criminal Law* (2003) 208. Also see *Prosecutor v Aleksovski* IT-95-14/1-T (25 June 1999) (“*Aleksovski*”) para 103.

<sup>1277</sup> See Kemp et al *Criminal Law* 519; 4 4 above.

is nothing in the language of Article 7(3) that precludes its application to civilians.<sup>1278</sup> Karibi J importantly refers to, amongst other authorities, the case of *United States v Flick et al*<sup>1279</sup> where the Court held that civilian industrialists were liable for crimes against humanity and war crimes due to their involvement in a slave labour scheme.<sup>1280</sup> Referring to the United Nations War Crimes Commission,<sup>1281</sup> the judge further held that, although there is no explicit reference to the doctrine of superior responsibility, it is clear that the decision was founded on those very principles and specifically a duty to prevent harm.<sup>1282</sup> It was thus concluded by the Trial Chamber that the doctrine may apply outside of military context to ordinary civilians.<sup>1283</sup>

The second element relates to the requisite *mens rea* of the superior also known as the cognitive element. The superior must have known or possessed information that should have brought him or her to the conclusion that crimes were being committed or had been committed.<sup>1284</sup> It is apparent that negligence would be a sufficient form of *mens rea*.<sup>1285</sup> Danner & Martinez note that most of the doctrinal development surrounding the superior responsibility has revolved around this issue as well as the degree of negligence required.<sup>1286</sup> This is due to various instruments implementing different wording and standards. Article 86(2) of Protocol I to the Geneva Convention states that superiors would incur criminal liability

if they knew, or had information *which should have enabled them to conclude* in the circumstances at the time, that he was committing or was going to commit such a

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<sup>1278</sup> *Delalić Trial* para 355.

<sup>1279</sup> 1947 Vol. VI TWC.

<sup>1280</sup> *Flick et al* 1202.

<sup>1281</sup> See United Nations War Crimes Commission *The United Nations War Crimes Commission* Vol VI 54.

<sup>1282</sup> *Delalić Trial* para 360.

<sup>1283</sup> *Delalić Trial* para 363; *Aleksovski* para 103. Also see C Meloni “Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46C)” in Werle & Vormbaum (eds) *Malabo Protocol* (2017) 139 149.

<sup>1284</sup> Cassese *International Criminal Law* (2003) 209; Van Sliedregt (2009) *New Criminal Law Review* 421.

<sup>1285</sup> Cassese *International Criminal Law* (2003) 209.

<sup>1286</sup> Danner & Martinez (2004) *California Law Review* 125.

breach and if they did not take all feasible measures within their power to prevent or repress the breach.<sup>1287</sup>

There is however a “significant discrepancy” between the English and French texts.<sup>1288</sup> The relevant part of the French text translates to “information enabling them to conclude (...)” whereas the English text states “information which *should* have enabled them to conclude”.<sup>1289</sup> It has been suggested that the French text should be followed because it encompasses both alternatives and gives effect to the purpose and objects of the treaty.<sup>1290</sup>

#### **6 4 1 3      *Article 28 of the Statute of Rome***

Article 28(a) of the Rome Statute explicitly deals with *command* responsibility relating to military or quasi-military leaders and states that:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28(b) makes separate reference to “superior responsibility” – therefore responsibility for relationships other than those described in article 28(a). The focus of the discussion of article 28 will be on article 28(a) due to the available authority

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<sup>1287</sup> Own emphasis.

<sup>1288</sup> Sandoz et al *Commentary* 3545.

<sup>1289</sup> Own emphasis. The original French text reads “des informations leur permettant de conclure”. Translation from *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 3545.

<sup>1290</sup> Sandoz et al *Commentary* 3545.



interpreting this provision. Where possible, principles applicable to article 28(b) will be highlighted. The article holds that

- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
  - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
  - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
  - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28(a) employs the doctrine of command responsibility by stating that military leaders or those effectively acting as such, shall be criminally responsible for crimes committed by military forces while under their “effective command and control” or “effective authority and control” where he or she failed to exercise proper control of those forces. The first instance under article 28(a) denotes instances where there was in fact formal appointment (“authority and control”), while the second instance pertains to instances where effective command is present and formal or legal appointment is not present but control is exercised through orders, directives and may be enforced by threats.<sup>1291</sup>

Article 28(a) affirms and incorporates the control standard as applied in *Delalić* where no formal appointment is required by explicitly stating that quasi-officials or those acting as such will qualify for responsibility. The ICC Pre-Trial Chamber in *The Prosecutor v. Jean-Pierre Bemba Gombo* (“*Bemba*”)<sup>1292</sup> furthermore affirmed the principles of the ICTY and ICTR tribunals by confirming that formal appointment is not required under article 28(a) irrespective of the rank of the accused or number of

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<sup>1291</sup> K Ambos *Treatise on International Criminal Law* vol I (2013) 210.

<sup>1292</sup> ICC-01/05-01/08 (15 June 2009).

soldiers under their authority or control.<sup>1293</sup> The level of control must not be negligible as it must constitute “effective control”. This effective control, despite the fact that the commander may wield a substantial<sup>1294</sup> degree of influence over subordinates, must also include “the material ability to prevent and punish” the relevant offences.<sup>1295</sup> The *Bemba* Pre-Trial Chamber appears to have added an additional requirement of causation: a link between the failure to exercise proper by the superior and the underlying crimes committed by his or her subordinates.<sup>1296</sup> This is supported by the text of the Statute of Rome – “(...) shall be criminally responsible” and “(...) as a result of his or her failure to exercise control properly”. This view is supported as the text clearly indicates that the crimes occurred to the commander’s failure to exercise proper control and had they in fact done so, the vexed result would not have ensued. The causation however only pertains to the prevention-duty and not the duty to report or repress the crimes because the latter two instances can only occur during or after the execution of the crimes, thus avoiding the absurdity that the failure of those duties “retroactively cause the crimes to be committed”.<sup>1297</sup>

Article 28 furthermore incorporates a variety of standards of *mens rea*. Article 28(a) states that commanders or persons acting as such incurs liability if they “(...) either knew or, owing to the circumstances at the time, should have known (...)” about forces currently committing or were about to commit such crimes and furthermore that they failed to take all necessary and reasonable steps within their power to prevent or repress such conduct or report it to the authorities.<sup>1298</sup> Apart from actual knowledge, some form of negligence would seem acceptable due to the use of the words “should have known”.

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<sup>1293</sup> *Bemba* para 408. The Pre-Trial Chamber further held at para 410 that these quasi-military commanders could potentially include police units, paramilitary units, armed resistance movements, militias (that follow a military structure or hierarchy and rebel groups).

<sup>1294</sup> The *Bemba* Trial Chamber para 415 in this regard also refers to *Prosecutor v Enver Hadžihasanović & Amir Kubura* IT-01-47-T (15 March 2006) paras 80 and 795 where the ICTY Trial Chamber found that “[t]he simple exercise of powers of influence over subordinates does not suffice”.

<sup>1295</sup> *Bemba* para 415 approvingly quoting and relying on the *Delalić* Appeal para 197-199 especially (and therefore approving the interpretation by the *Delalić* Trial Chamber para 378).

<sup>1296</sup> *Bemba* para 423-424.

<sup>1297</sup> *Bemba* para 424. The Pre-Trial Chamber points out that this illogical reasoning caused the ICTY in the *Delalić* Trial Chamber (para 400) to reject this causal link “altogether”. Also see Werle & Jessberger *Principles* 232-234.

<sup>1298</sup> Article 28(a)(i) and (ii).

A duty to act (and therefore liability for an omission)<sup>1299</sup> is therefore placed on commanders thus reducing the risk of being absolved of from criminal responsibility through ignorance (or acquiescence). Where a failure to act, repress or report occurs, it appears that although article 28 does not *impute* liability for the offences on the commander but rather creates a separate form of liability due to a failure to act.<sup>1300</sup>

Article 28(b), with regards to superior responsibility, appears to add a higher standard or degree of negligence or recklessness as the superior must either have known “or consciously disregarded information which clearly indicated” the commission of crimes by his or her subordinates.<sup>1301</sup>

#### **6 4 1 4      *Article 46B(3) of the Annex to the Malabo Protocol***

Article 46B(3) of the Annex to the Malabo Protocol holds that

The fact that any of the acts referred to in article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Meloni points out that the drafters opted for language akin to that of the ICTY and ICTR Statutes rather than that of the ICC Statute.<sup>1302</sup> This definition also departs from comprehensive and precise wording opted by the drafters of the ICC Statute.<sup>1303</sup> Despite not differentiating between superior and civilian responsibility (similarly to the ICC Statute), it is clear from the principles set out above from the ICTY and ICTR Statutes that the scope of superior transcends formal appointment as superior.<sup>1304</sup>

The construction of *mens rea* is established either through *actual* knowledge (“he or she knew”) or through information that should equip or enable the superior with

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<sup>1299</sup> See G Werle “Individual Criminal Responsibility in Article 25 ICC Statute” 5 (2007) *Journal of International Criminal Justice* 953 965. Here the author compares section 28 to another instance of liability for omissions under the Rome Statute, such as article 8(2)(b)(xxv) of the Statute of Rome (depriving civilians of food) required for survival.

<sup>1300</sup> Van Sliedregt (2009) *New Criminal Law Review* 429.

<sup>1301</sup> Article 28(b)(i). See Werle & Jessberger *Principles* 229.

<sup>1302</sup> Meloni “Modes of Responsibility” in Werle & Vormbaum (eds) *Malabo Protocol* 148.

<sup>1303</sup> Meloni “Modes of Responsibility” in Werle & Vormbaum (eds) *Malabo Protocol* 148.

<sup>1304</sup> Also see Meloni “Modes of Responsibility” in Werle & Vormbaum (eds) *Malabo Protocol* 149.

knowledge of crimes or potential crimes by subordinates (“had reason to know”). There is furthermore a positive obligation on the superior to take steps to prevent potential harm. Article 46B(3) can thus also be regarded as both a conventional mode of liability and an *omissio per commissionem*.<sup>1305</sup>

#### **6 4 1 5      *South African perspective: Command responsibility and liability through omissions***

The discussion above (on international criminal law principles) provides a potentially useful dogmatic framework in terms of which the leader of a criminal gang may be held liable for the actions of his subordinates. It was illustrated in the previous section that there is a significant basis for holding leaders responsible for their own actions but also for the actions of their subordinates. Command responsibility in essence obligates the commander to take responsibility for the actions of his or her subordinates. This must be done through effectively controlling them or punishing them when they have acted outside of their mandate. It also requires the commander to, at all times, be aware of the activities of his or her subordinates.

What about applicability in an unlawful organisation or gang? Does the general public or community require that these leaders take responsibility for and over the actions of their subordinates in a similar vein to military or civilian commanders? The answer might be evasive because these structures differ in the sense that military or civilian structures in the context of international law is legitimate, and criminal gangs are obviously not legitimate. Even when one is dealing with quasi-military structures such as rebel groups (as in the *Bemba* case before the ICC referred to above) the focus is not the legitimacy of the organisation as such, but rather the conduct of the superiors and subordinates. Thus, if asked, the legal convictions of the community would probably dictate that gang leaders *should* be held responsible for the deeds of their subordinates even where their own physical involvement cannot be proven, on the basis that the organisation is per se illegitimate because of its criminal aims and activities.

The next question is whether there is an existing legal framework or structure to facilitate such an approach or would such an approach require the enactment of additional legislation? It is submitted here that considering the constitutional

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<sup>1305</sup> See further the discussion *omissio per commissionem* at 6 4 1 5 2.

imperatives on courts to develop the common law and consider foreign and international law (as illustrated above) and existing common law measures, courts would be able to draw inspiration to hold leaders responsible for crimes committed by subordinates. A legislative response would however be more appropriate in order to avoid constitutional issues such as a violation of the *ius praevium* and *ius certum* facets of the principle of legality. There is also the democratic principle that drastic legal reform should be done by the representatives of the people, through the legislator, rather than from the bench by unelected judges.

Nevertheless, it is worthwhile to explore the applicability and possible adaptation of the general principles of criminal law considering the possible lessons from international and foreign law. The starting point is that the existence of a static gang within the ambit of section 1 of POCA is not required, and the focus is more on the *control* over a structure or system involved in criminal activities. The proposition is that where the crimes are vast and indiscriminate and where individual perpetrators cannot be properly identified or held responsible (think mass atrocities under international law, or consistent and widespread instances of violent crime in a metropolitan area such as the Cape Flats) but the leader or commander effectively in control over a certain geographical area or over a set class of subordinates is identifiable, such a leader should then be held responsible for creating the dangerous situation (what we for present purposes can call “gangsterism”) and then failing to prevent harm.

#### **6 4 1 5 1      Normative framework**

As we know, South African criminal law historically did not attach liability for omissions. Certain categories have crystallised mainly through case law and in limited instances also legislation.<sup>1306</sup> The crystallised instances do not form a closed list of legal duties but the underlying requirement is that the legal convictions of the community dictate such a requirement. In the context of the law of delict, Rumpff CJ

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<sup>1306</sup> See for example (in the context of organised crime) section 29 of the Financial Intelligence Centre Act 38 of 2001 read with section 7A of POCA which creates a statutory obligation on business owners, managers or employees to report, inter alia, transactions they suspect are financed with proceeds of unlawful activities. See also Kemp et al *Criminal Law* 58; Burchell *Principles* 85-86. The authors point out a number of statutory obligations such those established in terms of the Inquests Act 58 of 1959 and The Road Traffic Act 93 of 1996.

in *Minister van Polisie v Ewels* (“*Ewels*”)<sup>1307</sup> set out the following general test (and broad) test:<sup>1308</sup>

[T]he circumstances of the case are of such a nature that the omission not only incites moral indignation but also that the legal convictions of the community demand that the omission ought to be regarded as unlawful and that the damage suffered ought to be made good by the person who neglected to do a positive act.<sup>1309</sup>

The court in *S v Gaba*<sup>1310</sup> also adopted this broad test and thus has been embraced into criminal law as well. One must however question the continued reliance on this test in the constitutional era. In *S v Makwanyane* (“*Makwanyane*”)<sup>1311</sup> the Constitutional Court rejected the reliance on public opinion as a decisive factor for the retention of the death penalty.<sup>1312</sup> There it was held that the constitutional adjudication process would be rendered futile if the court had to answer to the will of the public. Chaskelson CJ also held that public opinion could also further marginalise or displace disenfranchised minority parties who in fact require the further protection.<sup>1313</sup> The point is that the organic development of the law, as a reflection of public will or public opinion (which is often the *perception* of a judicial officer of such convictions and necessarily an empirical assessment), is necessary. This organic development should however be done with due consideration of the other demands and interests at stake, notably the principles noted in this chapter and others concerning the principle of legality. So, from a normative point of view, it is submitted here that the development of general principles, also under guidance of the legal convictions of the community, can be of assistance to embrace new notions such as command responsibility in non-military contexts, or liability for omissions by persons in *de facto* leadership roles, such as gang leaders. But this must be done with care, and always through the lens of the Constitution as a whole.

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<sup>1307</sup> 1975 (3) SA 590 (A).

<sup>1308</sup> See Kemp et al *Criminal Law* 56.

<sup>1309</sup> *Ewels* at 597 (translated).

<sup>1310</sup> 1981 (3) SA 745 (O).

<sup>1311</sup> 1995 (3) SA 391 (CC).

<sup>1312</sup> See paras 87-89; Snyman *Criminal Law* 262-263 fn 55.

<sup>1313</sup> *Makwanyane* para 88.

## 6 4 1 5 2     *Prior (positive) conduct*

One of the recognised instances of liability through omission is through a prior action that creates a dangerous scenario that might inflict harm to innocent parties. Where a person creates this potentially dangerous situation, there is a legal duty on him or her to prevent the potential harm from ensuing.<sup>1314</sup> For this reason it is also referred to as *omissio per commissionem* (combined action and omission) because a person both acts positively through creating the dangerous scenario but also through omission by failing to prevent the potential harm from ensuing. Therefore, it cannot be considered to be a pure omission.<sup>1315</sup>

It is submitted that a leader of a criminal gang falls under this category of liability. He or she creates a dangerous scenario by managing a criminal gang and instructing them to commit criminal gang activities which, of course, may include derivative activities by the subordinates. These activities may be potentially or inherently violent and the leader subsequently fails to take measures to adequately instruct them to refrain from violence. It is submitted that this type of conduct quite patently falls under this recognised category of liability through omission. At the very least “the legal convictions of the community” would desire such a person to be held liable for his involvement and leadership in a criminal gang. This is quite clear if one considers the constitutional imperatives guaranteeing every citizen to be free of violence both from public and private spheres.<sup>1316</sup> The preamble to POCA specifically mentions the difficulty in proving a link between leaders who instruct or dictate the commission of offences and the resultant crimes. Judgments such as *S v Thebus and Another* (“*Thebus*”)<sup>1317</sup> give judicial expression that group or organised criminality is a “significant societal scourge”<sup>1318</sup> and that deviation from the traditional standards of criminal liability is justifiable.<sup>1319</sup> Positive risk-creating actions by the leader of a criminal gang, coupled with an omission to end or alleviate risky conduct and unlawful activities by subordinates, warrant criminal liability.

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<sup>1314</sup> Burchell *Principles* 81; Kemp et al *Criminal Law* 59.

<sup>1315</sup> Burchell *Principles* 81.

<sup>1316</sup> See 5 2 above.

<sup>1317</sup> 2003 (6) SA 505 (CC).

<sup>1318</sup> *Thebus* para 34.

<sup>1319</sup> See Chapter 3 above for a comprehensive discussion on the *Thebus* judgement.



### 6 4 1 5 3 **Overview: Prior positive conduct or liability for creating a dangerous situation and failure to prevent harm from ensuing**

Based on the discussion above with regards to command responsibility<sup>1320</sup> as well as liability for omissions in general, a model will be proposed to hold the leaders of gangs responsible for crimes committed by their members or subordinates.

Grounded in the legal convictions of the community, a legal duty may rest on gang leaders for creating a dangerous situation by operating a criminal gang. This differs from command responsibility where it appears from the earliest authorities that a special duty of care rests on the commanders to control and discipline their subordinates.

Liability therefor ensues for creating the dangerous situation and secondly for failing to prevent the dangerous consequence from ensuing. Despite this being a *novel application* (rather than an *extension*) of this specific category of liability for omissions, it is justifiable by public policy.

Also, considering that gangs often function in a quasi-military fashion, the extension of superior liability may also be warranted.

### 6 4 2 *Control through an organisation: Article 25(3)(a) of the Statute of Rome*

Article 25(3)(a) unambiguously states that (despite the principle of individual criminal responsibility laid out in article 25(2)), a person shall not escape criminal liability and subsequent punishment if he or she “[c]ommits such a crime, whether as an individual, jointly with another or through another person”.

The liability of the accused under article 25(3)(a) is furthermore independent of “the other person” (a subordinate) mentioned in that article. Thus, liability may even attach where “the other person” attracts no criminal responsibility.<sup>1321</sup> These are instances where the physical perpetrator’s (the subordinate’s) criminal responsibility cannot be proved or where liability is excluded on another basis such as age<sup>1322</sup> or another

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<sup>1320</sup> I am however cognizant of the fact that certain principles pertaining to command responsibility are still highly contentious, for example the standard of *mens rea*.

<sup>1321</sup> *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 (29 January 2007) para 339.

<sup>1322</sup> Article 26 of the Statute of Rome has “no jurisdiction” over a person who committed an alleged crime while he or she was under the age of eighteen.

ground for excluding criminal responsibility.<sup>1323</sup> This definition is thus broader than the perpetration-by-means model or the Anglo-American (and South African)<sup>1324</sup> innocent agent doctrine where the physical perpetrator does not typically possess criminal capacity.<sup>1325</sup> That said, the contribution of German criminal law doctrine, and more specifically the doctrine of *Organisationsherrschaft*, may present a better doctrinal basis for liability of individuals in leadership positions.

#### **6 4 2 1      A brief overview of *Organisationsherrschaft***

The control theory or “indirect perpetrator” is not unknown to foreign legal systems and has its most prominent application and origins in German law.<sup>1326</sup> It has been codified in section 25 of the German Criminal Code 1998 (*Strafgesetzbuch* – hereinafter “StGB”).<sup>1327</sup> Section 25 defines a principal as including “[a]ny person who commits the offence himself or through another shall be liable as a principal”.<sup>1328</sup> This type of principal is known as an indirect perpetrator (*mittelbare Täter*).<sup>1329</sup> Neha points out that the use of the word “through” indicates that there is existence of two parties. The first party is the *Hintermann* or indirect perpetrator (also known as the individual in the background or the perpetrator behind the perpetrator) who uses or controls his

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<sup>1323</sup> See especially Articles 31 and 32 of the Statute of Rome. Article 31(1)(a) excludes liability due to mental disease; Article 31(1)(b) excludes liability due to intoxication; Article 31(1)(c) excludes liability due to private defence and necessity and Article 31(1)(a) excludes liability due duress. Each of these grounds have their own set of requirements. Article 31(3), read with Article 21 (applicable law) furthermore states that the Court may consider grounds other than those mentioned in Article 31 if that ground is derived from applicable law as per Article 21. Article 32 excludes liability in instances of a mistake of law. A mistake of law in terms of Article 32 shall only apply in instances pertaining to the mental element of a crime (Article 32(1)). Rule 145(2)(a)(i) of the Rules Procedure and Evidence of the International Criminal Court also allows the Court to take into account someone’s dismissed capacity at sentencing in instances where it falls short of completely excluding liability. See generally Werle *Principles* 239-244 for a discussion on the exclusion of liability under international criminal law.

<sup>1324</sup> See Burchell *Principles* 475-477; Kemp et al *Criminal Law* 260-261.

<sup>1325</sup> Jessberger & Geneuss (2008) *Journal of International Criminal Justice* 857.

<sup>1326</sup> See generally the work of Claus Roxin – C Roxin *Tatherrschaft* (2006).

<sup>1327</sup> See M Bohlander “German Criminal Code” (10-10-2013) *Bundesministerium der Justiz und für Verbraucherschutz* <[http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0143](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0143)> (accessed 28-08-2017).

<sup>1328</sup> The original German text states “Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht”.

<sup>1329</sup> Neha (2011) *CJIL* 159.

pawn known as the direct perpetrator or *Frontmann*.<sup>1330</sup> This *Hintermann-Frontmann* relationship is however distinguishable from other forms of participation because it presupposes some kind of dominance, manipulation or control by the *Hintermann* over the *Frontmann* and this power over the latter may also render him without criminal responsibility.<sup>1331</sup> *Organisationsherrschaft* is a specific manifestation of the indirect perpetrator doctrine and whereupon the ICC seems to have construed its interpretation of article 25(3)(a) of the Statute of Rome.<sup>1332</sup>

*Organisationsherrschaft* is also dependent on the existence of a hierarchal criminal structure (as will be discussed below) in which the direct perpetrators in the organisation are considered interchangeable and insignificant to the actual execution of the criminal plot. There is no form of dominance or manipulation over the indirect perpetrator *per se* but the execution of the criminal act is guaranteed through the immediate availability of a substitute providing execution if another is unwilling, while the authority over this process lies with the indirect perpetrator.<sup>1333</sup> This will also be discussed in more detail below.

Neha outlines the requirements or elements in Roxin's original structure of *Organisationsherrschaft*. The first requirement is proof of the existence of a hierarchal structure. This structure must be equipped with a so-called "unlimited exchangeability" or fungibility of potential direct perpetrators to execute the criminal plan and finally that organisation must function outside of the law.<sup>1334</sup> The first and second requirement

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<sup>1330</sup> Neha (2011) *CJIL* 171.

<sup>1331</sup> See A Eser "Individual Criminal Responsibility" in A Cassese, P Gaeta & JRDW Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* vol I (2002) 767 793; Neha (2011) *CJIL* 171.

<sup>1332</sup> See for example *Katanga & Chui* at para 515 where the Trial-Chamber describes indirect perpetration – specifically *Organisationsherrschaft* although not explicitly calling it by that title. See also S Manacorda & C Meloni "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?" 9 (2011) *Journal of International Criminal Justice* 159 164.

<sup>1333</sup> Neha (2011) *CJIL* 172.

<sup>1334</sup> Neha (2011) *CJIL* 173-174. See also H Radtke *Goltdammer's Archiv für Strafrecht* (2006).

have translated into ICC case law but not the final requirement.<sup>1335</sup> The scope of Roxin's *Organisationsherrschaft* also seems to have been extended or undergone permutation by the Federal Court of Germany (*Bundesgerichtshof*).<sup>1336</sup>

#### **6 4 2 2      *Elements of Article 25(3)(a): Review of ICC case law***

According to the ICC Trial-Chamber in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ("Katanga & Chui"),<sup>1337</sup> the ICC statute envisages three modes of *perpetrator* liability in Article 25(3)(a).<sup>1338</sup> That is, in the first instance, where the person has personally carried out all the physical or objective elements of the crime. Secondly, where the person has, together with another, has control over a crime due to tasks that were assigned to him or her – which would constitute a joint-commission of said crime with another. Lastly, a person will also be principally responsible where he or she "controls the will" of those who physically execute the objective elements of the crime. This will constitute the commission of a crime *through* another.<sup>1339</sup>

This third type of liability acknowledges perpetrators in an objective-cum-subjective approach where principals can both contribute to the crime through contribution to the physical elements of the crime and includes those who control or are the masterminds behind the crimes – despite being physically removed from the scene of the crime.<sup>1340</sup> Thus, a "mastermind" may commit crimes *through* his or her organisation or (criminal) machinery without being physically present. The mastermind (with subjective intent of

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<sup>1335</sup> See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* ("Ruto et al") ICC-01/09-01/11-373 (05 February 2012) 313-332 where the (objective) requirements for holding the superior (or indirect perpetrator in *Organisationsherrschaft* terms) responsible, were described as control over the organisation; that organisation must have a hierarchal and organised structure and the criminal plans must have an almost-automatic execution as described above and below. See also *Katanga & Chui* 515-518.

<sup>1336</sup> Neha (2011) *CJIL* 172-173.

<sup>1337</sup> ICC-01/04-01/07 (30 September 2008).

<sup>1338</sup> The same was found in the earlier matter of *Dyilo* 2007 para. The case pointed out that direct perpetration, co-perpetration as well as indirect perpetration (the commission of a crime through another person or using them as an instrument to commit crime) are all modes of perpetration under section 25(3)(a). Also see Eser "Individual Criminal Responsibility" in *International Criminal Court* 793.

<sup>1339</sup> *Katanga & Chui* para 488.

<sup>1340</sup> *Dyilo* 2007 para 330; 338-339. See above at 6 4 2 3 for a discussion on the on the debate surrounding the objective and subjective approach regarding criminal responsibility in German law.

having awareness of the circumstances)<sup>1341</sup> orchestrates the crimes and the members of the organisation who physically perpetrate the crimes. Therefore, the traditional concept of co-perpetration “coincides” with joint control over the crime due to the “various contributions” essential to the commission of the crime.<sup>1342</sup>

#### **6 4 2 2 1      Objective elements**

The ICC Trial Chamber in *Katanga & Chui* embarked on a detailed discussion (and justification) of the objective-cum-subjective approach.

The Trial Chamber first delineated the objective elements required to establish liability under section 25(3)(a).<sup>1343</sup> The leader of the organisation must firstly have control over the organisation.<sup>1344</sup> According to the Trial Chamber the control element manifests itself through the compliance by the subordinates with the orders of the leader. Compliance with these orders is ensured through a mixture of negative (punishment)<sup>1345</sup> and positive (providing resources, payment<sup>1346</sup> and employment) reinforcements as well as through violent and strict training to guarantee “automatic compliance” (which is the final requirement).<sup>1347</sup>

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<sup>1341</sup> *Dyilo 2007* para 331.

<sup>1342</sup> *Dyilo 2007* para 341.

<sup>1343</sup> Also see *Ruto et al* para 313.

<sup>1344</sup> *Katanga & Chui* paras 500-510. Also see *Ruto et al* paras 292; 313-332.

<sup>1345</sup> See *Ruto et al* paras 324-325 where a witness submitted that people were forced to fight and [a]nyone who did not want to participate was considered a traitor and was to be killed”. Refusing the incentives discussed below (fn 1330) will be seen as suspicious and someone could be suspected for being a spy for such refusal. Physical punishment such as beatings would also take place to ensure compliance (see paras 325-326).

<sup>1346</sup> *Ruto et al* para 320. Here the Pre-Trial Chamber of the ICC points out payment incentives used to motivate subordinates for their participation in committing crimes against humanity. This usually occurred in two forms: firstly, through stipends or salaries to serve a motivation and the other form was given as a reward for killing people of a certain faction or destroying their property.

<sup>1347</sup> *Katanga & Chui* para 513; 518. The Trial Chamber points to the training regimes where minors are abducted and “taught to shoot, pillage, rape and kill”. Weigend argues that the Trial Chamber here felt “compelled” to add training regimes as a mechanism of control as because Roxin’s original model “(...) hardly lends itself to be applied to vaguely organized militias or rebel armies (...)” and that the Trial Chamber compensated for this by adding new requirements unique to the specific case (Weigend (2011) *Journal of International Criminal Justice* 107). Manacorda & Meloni also share this sentiment – see Manacorda & Meloni (2011) *Journal of International Criminal Justice* 171.

Control over an organisation may also be proved in less drastic fashion – such as evidence pertaining to an accused being on top of a hierarchal structure with commanders reporting to him, the giving of orders that would eventually reach the physical perpetrators, the assignment of commanders to specific areas, and the distribution of weapons.<sup>1348</sup>

The second element, namely the existence of an “organised and hierarchical apparatus of power”, is also essential.<sup>1349</sup> This is proven mainly by evidence of a superior-subordinate relationship.<sup>1350</sup> It is crucial that the leader exercises control and authority over subordinates in this relationship and that proof of such manifests in the compliance with the orders.<sup>1351</sup> No proof of a common plan or objective is required.

Thirdly, the orders must be complied with in a manner which is “almost automatic”.<sup>1352</sup> This pertains to the manner described above – where the identity of the individual actor is irrelevant.<sup>1353</sup> If one subordinate does not carry out the plan, another will take his or her place and execute the plan. And therein lies the “almost automatic” machinelike compliance. In this scheme, perpetrators are said to lose their individuality. Despite the fact that the subordinate is still acting as an autonomous agent, he or she is “an interchangeable figure” in the mind of the leader.<sup>1354</sup> The ICC Trial Chamber goes further and holds that the organisation, in this context, develops a life independent of its individual members and thus a different kind of liability must attach than normal instances where criminal orders or instructions are given.<sup>1355</sup> The Chamber reasoned that this automatic compliance is the reason for attaching principal liability and not accessory liability. The control of the leader therefore transcends that of mere instruction. It is through the unassailable control over the organisation and the subordinate (the physical perpetrator) that the perpetration of the crime is also controlled and dictated.<sup>1356</sup>

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<sup>1348</sup> See *Ruto et al* paras 197-198; 328.

<sup>1349</sup> See *Katanga & Chui* para 511. Also see *Ruto et al* paras 292; 313-332.

<sup>1350</sup> *Katanga & Chui* para 512.

<sup>1351</sup> *Katanga & Chui* para 513.

<sup>1352</sup> *Katanga & Chui* para 515. Also see *Ruto et al* paras 292; 313-332.

<sup>1353</sup> *Katanga & Chui* para 515-517.

<sup>1354</sup> *Katanga & Chui* para 515 quoting Roxin *Täterschaft* (2006) 245.

<sup>1355</sup> *Katanga & Chui* para 517.

<sup>1356</sup> *Katanga & Chui* para 518.

The orders of a superior or leader can be effectuated by any person or subordinate who is considered to be replaceable or fungible (or a cog in the machinery) in the organisation which exists within a hierarchical structure.<sup>1357</sup> This fungibility or replicability of members, although emphasised, is not a requirement but serves merely as evidence of the control of the leader, and smaller hierarchical and liability may be capable of being adapted for the criminal gang context.<sup>1358</sup>

The ICC Pre-Trial Chamber II in *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (“*Ruto et al*”)<sup>1359</sup> followed a substantially similar approach as in *Katanga & Chui*. In addition to enumerating the three objective elements as described in *Katanga & Chui*, the Pre-Trial Chamber in *Ruto et al* states that the requirements of the crime must have been carried out by the accused through a common plan or agreement with others and that the “suspects and other co-perpetrator(s) must carry out essential contributions in a coordinated manner” which caused the material elements of the crime to be fulfilled.<sup>1360</sup> This is in contrast to *Katanga & Chui* where the Pre-Trial Chamber addressed these as “additional objective elements” for the joint-commission of crimes.<sup>1361</sup> It is therefore submitted that the PTC in *Ruto et al* failed to properly delineate the requirements for co-perpetration (of the superiors), on the one hand and, on the other hand, the elements for perpetration through another. It will be shown below that the ICC has amalgamated these concepts into one form of perpetration.

The ICC Pre-Trial Chamber in *Prosecutor v. Thomas Lubanga Dyilo* (“*Dyilo 2006*”)<sup>1362</sup> took a somewhat different approach and did not explicitly list the requirements for liability under Article 25(3)(a).<sup>1363</sup> The Pre-Trial Chamber held that it had reasonable grounds to find the following: that Mr Lubanga was the president of the *Union des Patriotes Congolais* (“UPC”) and that he had founded the *Forces Patriotiques pour la Libération du Congo* (“FPLC”) which was the military wing of the

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<sup>1357</sup> *Katanga & Chui* 512; 518.

<sup>1358</sup> Werle *Principles* 210. Also see M Osiel *Making Sense of Mass Atrocities* (2009) 103.

<sup>1359</sup> ICC-01/09-01/11-373 (05 February 2012).

<sup>1360</sup> *Ruto et al* para 292.

<sup>1361</sup> See *Katanga & Chui* paras 494; 519-526.

<sup>1362</sup> ICC-01/04-01/06 (24 February 2006).

<sup>1363</sup> Also see Jessberger & Geneuss (2008) *Journal of International Criminal Justice* 863; fn 48 where the authors describe the listing or elucidation of requirements as implicit.



UPC. He consequently became the commander-in-chief of the FPLC and “exercised *de jure* authority” based on a “hierarchal relationship” over members of the “hierarchically organised armed group[s]”.<sup>1364</sup> This elucidates certain requirements. A group, which is organised in a hierarchal fashion, must exist. The accused must have control or authority over this group due to his or her position of authority, for instance there must be evidence that the accused “had the final say” regarding policies and practices of the UPC and FPLC.<sup>1365</sup> The accused (leader) must finally also be “aware of [their] unique role within [the organisation] and actively use it”.<sup>1366</sup>

If these elements or requirements had to be further synthesised, the requirements would be the existence of a hierarchically organised group over which the leader (or indirect perpetrator) actively exercises authority over his subordinates with knowledge or consciousness of this authority.

It must however be noted, again, that the ICC has fused the notions of co-perpetration and perpetration through another person in judgments implementing perpetration through another person.<sup>1367</sup> The Pre-Trial Chamber in *Katanga & Chui* noted that the scenarios listed in Article 25(3)(a) utilised the disjunctive word “or”. An inclusive interpretation (meaning that *either* or all of the alternatives are possible) or exclusive (one of alternatives may be followed but not both) would result in a strict textualist approach.<sup>1368</sup> Furthermore, the Chamber found that joint-commission of crimes through another person was “in accordance with the Statute”.<sup>1369</sup> This approach was then furthermore succinctly formulated as follows:

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<sup>1364</sup> *Dyilo* 2006 at paras 94-96.

<sup>1365</sup> *Dyilo* 2006 at paras 95. Also see Jessberger & Geneuss (2008) *Journal of International Criminal Justice* 863; fn 48.

<sup>1366</sup> *Dyilo* 2006 at para 95.

<sup>1367</sup> See *Ruto et al* para 289 where it was noted that the Pre-Trial Chamber I “provided a dynamic or effective interpretation of the provision by way of merging the two modes of participation” and that this was in line the rules of interpretation as provided by article 31 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969 entered into force 27 January 1980) 1155 UNTS 331. See further Weigend (2011) *Journal of International Criminal Justice* 92; Jessberger & Geneuss (2008) *Journal of International Criminal Justice* 859; fn 29; Manacorda & Meloni (2011) *Journal of International Criminal Justice* 171-175.

<sup>1368</sup> *Katanga & Chui* para 491.

<sup>1369</sup> *Katanga & Chui* para 491 – quoting the last part of Article 25(2) of the Statute.

The Chamber finds that there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of "senior leaders" adequately.<sup>1370</sup>

The Trial Chamber further held that where a leader has no (*de facto* or *de jure*) control over a subordinate who himself cannot be held liable, such a leader cannot be held accountable for committing a crime through the innocent subordinate. This person may however be held liable for committing a crime through another person where he or she acts jointly with another who does in fact have control over the physical perpetrator.<sup>1371</sup> For purposes of this study, the focus is on single control authorities or leaders who are not acting in collaboration with another superior and therefore only on the general principles of committing crimes through an organisation. The focus is only on *the most* high-ranking gang leaders – however this author is cognizant of the fact that multiple permutations of hierarchal structures are possible with more than one authority or instructing figure. This might be especially useful where a lower ranking member instructs the "directives" of a gang leader.

#### **6 4 2 2 2      Subjective elements**

The subjective elements are not focused on in literature dealing with indirect perpetration or perpetration through an organisation. The focus is mostly on the general objective or physical requirements.

The Pre-Trial Chamber II of the ICC delineated certain subjective elements in *Ruto et al* – once again mostly in the context of indirect perpetration by means of joint-perpetration. The accused must firstly satisfy the specific subjective elements of the crime perpetrated, which is defined in terms of Article 30 of the Rome Statute.<sup>1372</sup> Article 30(1) sets the standard of intent and knowledge. A person shall be deemed as having intent when that person "*means to engage in the conduct*"<sup>1373</sup> and that person must *mean* for vexed consequences (for example genocide) to have occurred "or is

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<sup>1370</sup> *Katanga & Chui* at para 492.

<sup>1371</sup> *Katanga & Chui* paras 493-494.

<sup>1372</sup> *Ruto et al* para 333.

<sup>1373</sup> Article 30(2)(a) (own emphasis).

aware that it will occur in the ordinary course of events”.<sup>1374</sup> The requisite knowledge is determined or inferred where the accused is aware “(...) that a circumstance exists or a consequence will occur in the ordinary course of events” and the terms “know” and “knowingly” shall both be interpreted in light of this meaning.<sup>1375</sup> He or she must finally have awareness of factual circumstances that enable them to effectuate (joint) control<sup>1376</sup> over the commission of crimes through other persons, specifically, the subordinates.<sup>1377</sup>

#### **6 4 2 3      *A brief overview of problems with and criticisms against indirect perpetration***<sup>1378</sup>

Perpetration through an organisation has suffered criticism over the years. An obvious issue is the violation of the principle of personal guilt or individual criminal liability which dictates that only those who have personally contributed to the crime may be held criminally liable. This can also be traced back to the objective or subjective approaches to distinguish between principal or accessorial liability, which was subject to great debate in the German legal community.<sup>1379</sup> An objective approach holds that only one who satisfies the objective or physical elements of the crime, can attract criminal liability. A subjective approach, on the other hand, holds that persons who satisfies the mental or subjective elements of a crime can be held responsible for a crime, even though he or she did not physically carry out any of the physical elements of the crime.<sup>1380</sup> But in terms of Roxin’s doctrine, this problem is solved

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<sup>1374</sup> Article 30(2)(b). See also Weigend (2011) *Journal of International Criminal Justice* 108.

<sup>1375</sup> Article 30(3).

<sup>1376</sup> The Pre-Trial Chamber here refers to “joint control” because it was established that

<sup>1377</sup> *Ruto et al* 333.

<sup>1378</sup> The focus here will however mainly be on two of the conceptual or doctrinal issues. Another issue identified in case law was the existence of the doctrine of co-perpetration through another person in terms of in terms of customary international law. The Pre-Trial Chamber in *Ruto et al* para 289 did not find this argument persuasive as the main source of law for the ICC (per Article 21 of the Statute of Rome) is firstly, the Statute itself, the elements of crimes and the Rules of Procedure of Evidence of the Court. Then, according to the Pre-Trial Chamber, only if a *lacuna* exists in the Statute, will the Court consider other sources of international law, including those of other international or hybrid tribunals. It however found that this (combined) doctrine was consistent with the text of the Statute and Article 31 of the Vienna Convention.

<sup>1379</sup> See Weigend (2011) *Journal of International Criminal Justice* 95.

<sup>1380</sup> See Weigend (2011) *Journal of International Criminal Justice* 94-95.

based on dominance and the power to secure automatic compliance with orders. This will establish principal instead of accessory liability and thus an objective-cum-subjective approach as described above.<sup>1381</sup> This doctrinal approach is not known in South African criminal law; for the most part (the innocent agent doctrine being an exception),<sup>1382</sup> intention or a subjective state of mind must be associated with at least some sort of physical or objective action to establish criminal liability. Only three types of principal liability are recognised in our law.<sup>1383</sup> The first category relates to someone who has personally fulfilled all of the elements of the crime; secondly where someone instructs a person who may or may not be able to attract criminal liability (the “innocent agent” doctrine) such as a child under the age of 10<sup>1384</sup> or someone who has been subjected to coercion; and finally, a person who is liable under the common purpose doctrine.<sup>1385</sup>

Although the innocent agent doctrine is recognised in South African law, it is unlikely that the dominance exercised by a gang leader will *result* in a lack of criminal capacity. The doctrine is expressed in the maxim *qui facit per alium facit per se* (“*qui facit* doctrine”).<sup>1386</sup>

The existence of *true* dominance in these organisations has also been questioned. Weigend argues that the concepts of dominance and interchangeability of persons should not be conflated.<sup>1387</sup> Replacing one member of the criminal organisation due to unwillingness or the inability to execute a criminal order or plan, is not evidence of true dominance or fungibility.<sup>1388</sup> Such a strict or inflexible structure might have been present in Nazi Germany but the existence of such a structure in African armed conflicts may be doubted<sup>1389</sup> as the Trial Chamber in *Katanga & Chui* found that the

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<sup>1381</sup> See Manacorda & Meloni (2011) *Journal of International Criminal Justice* 172.

<sup>1382</sup> See also discussion at Chapter 3 3 above.

<sup>1383</sup> See Burchell *Principles* 475; Kemp et al *Criminal Law* 260-261.

<sup>1384</sup> Section 7(1) of the Child Justice Act 75 of 2008. See also RC Whiting “Principals and Accessories in Crime” (1980) 97(2) *South African Law Journal* 199 202.

<sup>1385</sup> See Burchell *Principles* 475-476; Kemp et al *Criminal Law* 260-261. See Chapter 3 3 above for a comprehensive discussion on the common purpose doctrine.

<sup>1386</sup> See subsequent section.

<sup>1387</sup> See Weigend (2011) *Journal of International Criminal Justice* 100-101.

<sup>1388</sup> See Weigend (2011) *Journal of International Criminal Justice* 100-101. Compare Manacorda & Meloni (2011) *Journal of International Criminal Justice* 170.

<sup>1389</sup> Manacorda & Meloni (2011) *Journal of International Criminal Justice* 171; Weigend (2011) *Journal of International Criminal Justice* 107.

training and reward programmes employed by superiors resulted in some sort of (pseudo-)dominance over subordinates as referred to above.<sup>1390</sup> “Organisation” and “structure” are thus terms in flux, and quite culture- and context specific.

#### **6 4 2 4      *Applicability in a local context***

##### **6 4 2 4 1      *Interaction with existing modes of liability***

The indirect perpetrator doctrine or control of a crime through an organisation overlaps mostly with the innocent agent doctrine expressed by the *qui facit* maxim, which is recognised in South African law.<sup>1391</sup> The maxim translates into “[a] person who commits an act through another person is taken as having committed it himself”.<sup>1392</sup> Liability will be attributed (or imputed) to such a person and he shall be held responsible as a principal.<sup>1393</sup> The question posed in *S v Matseare and Others* (“*Matseare*”)<sup>1394</sup> serves as an example. In this case the Court considered whether section 4(1) of the Dangerous Weapons Act 71 of 1968 is only applicable to a person who handled the dangerous weapon himself. The Court however held that this question has to be answered in the negative and liability may also attach to persons using the dangerous weapon through another person. Such a person (committing the crime *through* another) will be liable in instances where he or she employed coercion, mandate, persuasion or threat which “virtually” amounts to the *qui facit* doctrine.<sup>1395</sup> The use of the word “virtually” is unhelpful: it is unclear what actions would then qualify as *qui facit* if not through coercion, mandate, persuasion or threat. It would seem that these instances would in fact be perfect examples of when a crime is committed through another, as seen also in the discussion of ICC case law above.

*Qui facit* is however defective for the following reason: it requires proof of some sort of instruction to be proved beyond reasonable doubt. An argument for the use of *qui facit* would be in instances where criminal capacity is lacking, such as, for example, a

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<sup>1390</sup> *Katanga & Chui* para 513; 518. Also see Manacorda & Meloni (2011) *Journal of International Criminal Justice* 172; Weigend (2011) *Journal of International Criminal Justice* 107.

<sup>1391</sup> Burchell *Principles* 475-476; Kemp et al *Criminal Law* 260-261; Whiting *South African Law Journal* 202.

<sup>1392</sup> *S v Chirunga* 1998 (2) ZLR 601 (H).

<sup>1393</sup> Whiting *South African Law Journal* 202.

<sup>1394</sup> 1978 (2) SA 931 (T).

<sup>1395</sup> *Matseare* 932.

child under the age of 10. The lack of case law implementing this principle may also point to its difficulties. Similar difficulties are faced in proving the crime of incitement (and to a lesser extent conspiracy).<sup>1396</sup>

It is due to this evidentiary difficulty that a model focusing rather on the existence of an organisation and the ability to control such an organisation becomes particularly useful. The focus moves away from proving specific instructions or plots to the general control over an organisation and a general criminal mandate.

#### **6 4 2 4 2 Case study: *S v Thomas*<sup>1397</sup>**

Could a permutation of the indirect perpetrator or the doctrine of control over the organisation be used to hold the leaders of criminal gangs responsible for crimes committed by their subordinates? This section will investigate this possibility – predominantly in the light of the *Thomas* judgment.

In order to prove indirect perpetration under ICC case law, there must firstly be proof of control over an organisation. In *Katanga & Chui*, the facts showed that the accused was on top of a hierarchal structure due to commanders reporting to him. This method was the least controversial in establishing that the accused was the leader, or more aptly, in control of the organisation.<sup>1398</sup> Control may also be evidenced through (almost automatic) compliance with the orders of the superior.

Proving control over the 28s gangs was successfully established on the facts in *Thomas*. Several of the crimes committed by (subordinate) gang members were found to have been committed on instruction of Accused 1.<sup>1399</sup> There was also collateral evidence showing the authoritative position of Accused 1 within the structure of the 28s gang. Evidence by a police officer (Barker) who gave evidence of the tattoos and slang also indicated Accused 1's leadership role as well as his interactions with other accused persons.<sup>1400</sup> It will be recalled from the discussion in Chapter 4<sup>1401</sup> that Accused 1 had several tattoos including one stating "Die Ou" in Afrikaans (which can

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<sup>1396</sup> See Chapter 3 4 and 3 5 above.

<sup>1397</sup> 2015 JDR 1932 (WCC).

<sup>1398</sup> See for example *Ruto et al* at paras 197-198; 328 and 5 4 2 2 1 above.

<sup>1399</sup> See *Thomas* paras 480; 509-510; 524-531, for example. This are however only a few of several instances of Accused 1's criminal instructions.

<sup>1400</sup> See *Thomas* 481-485 especially.

<sup>1401</sup> 4 5 1 1 1 & 4 5 1 1 3 above.

be translated as “The Man” in English) and, according to the witness, this was an indication of Accused 1 being a leadership figure.<sup>1402</sup> Several witnesses also testified that he was an “inspector” – a person with a high rank within the 28s.<sup>1403</sup>

Barker further testified that Accused 1 had a unique leadership style as he also committed crimes himself – which contributed to members of the community fearing him even more than they would an unseen yet menacing gang leader. This fear led to community members refusing to testify against him.<sup>1404</sup> Another police officer (Bothma) testified of an instance where Accused 1 had returned from a court appearance and that some of the other accused had kneeled in front of him while he addressed them in their gang slang (*Sabela*).<sup>1405</sup> There was also evidence of a further witness (Adonis) who testified about his perception of Accused 1 being the most influential member of the 28s during his stint in Goodwood prison and also that gang members on “street level” were loyal towards him.<sup>1406</sup>

Due to this evidence and several other witness statements,<sup>1407</sup> the Court established, beyond a reasonable doubt, that Accused 1 was the leader of the 28s and also that he was in control of the enterprise as per section 2(1)(f) of POCA.<sup>1408</sup>

It is therefore clear that it can successfully be established whether someone is in control of a criminal gang, thus satisfying the first element. Accused 1 was a domineering figure in a criminal gang context as well as within his community. It is submitted that gang members often “allow” for dominance to facilitate a perverse symbiotic relationship between the gang member and the gang leader. Pinnock has also stated in this context: “At what point (...) do we make a distinction between the

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<sup>1402</sup> *Thomas* 481.

<sup>1403</sup> See for example *Thomas* 491, 496 and 502. Accused 1 however refuted that he was vested with this position and contended that he was rather a “sergeant 2” and even if he was an inspector, that position did not carry real authority as generals are the instruction-givers within the gang. See *Thomas* 183; 502.

<sup>1404</sup> *Thomas* 482; 484-486. This fear was even present in officials such as a correctional officer who refused to testify against Accused 1 due to his seeming omnipresence in prisons.

<sup>1405</sup> *Thomas* 482.

<sup>1406</sup> *Thomas* 490-491.

<sup>1407</sup> See *Thomas* 481-512; 521-522 for the evidence against Accused 1 in this context.

<sup>1408</sup> *Thomas* 512.



activities of a gang and the survival strategies of the poor?”<sup>1409</sup> This dominance ultimately ensures compliance with orders.

Wijnberg utilises Maslow’s motivation theory and hierarchy of needs<sup>1410</sup> in explaining how gangs fulfil the basic needs of an individual – needs that would have potentially been left unfulfilled were it not for an individual’s gang involvement.<sup>1411</sup> This allows for dominance to fulfil needs. Gang members may be dominated not only by fear and violence but for basic needs such as food, housing, money as well as drugs which become a need after gang members become dependent as they are abused as a coping mechanism as well as a means of payment.<sup>1412</sup> These constitute physiological needs.<sup>1413</sup> Safety needs<sup>1414</sup> are often met through the protection mechanisms gangs provide for their members due to the belief that belonging to a criminal gang will provide protection – at least from that specific gang. Gang members are however exponentially more likely to be exposed to violence and may often outweigh the “benefit” of receiving protection from a *specific* gang.<sup>1415</sup> They are thus exposed to dangers from conducting business for said gang, such those illustrated in Chapters 2 and 4 (of this dissertation). The last need to be discussed here<sup>1416</sup> is gang members’ need for belonging.<sup>1417</sup>

Quasi-military/rebel group contexts such as in *Katanga & Chui* and *Ruto* et al illustrate that compliance with orders or submission may be ensured through positive (employment, resources or employment) or negative (punishment) incentives. Similarly, gang members may allow for dominance in order to fulfil their basic needs or in order to survive.

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<sup>1409</sup> D Pinnock *The Brotherhoods: Street Gangs and State Control in Cape Town* (1984) 105. Also see Burchell *Principles* 909.

<sup>1410</sup> AH Maslow *Motivation and Personality* 3 ed (1987).

<sup>1411</sup> Wijnberg *Exploration* (2012) 41.

<sup>1412</sup> See, for example, *Thomas* 485.

<sup>1413</sup> Maslow *Motivation* 15; Wijnberg *Exploration* (2012) 42-43.

<sup>1414</sup> See Maslow *Motivation* 19.

<sup>1415</sup> Wijnberg *Exploration* (2012) 43-44.

<sup>1416</sup> See further Wijnberg *Exploration* (2012) 45-46 where the author discusses the need for esteem as well as the need for self-actualisation. See also BE van Wyk *Constructions of Gang Membership Among High School Youth* MSc (Psychology) thesis University of Stellenbosch (2001) where the author investigates, predominantly, the reasons why members of the youth in the Western Cape join criminal gangs. See especially 16 ff.

<sup>1417</sup> Maslow *Motivation* 20.

The second element, which refers back to the first element, requires the *existence* of an “organised and hierarchical apparatus of power” and is established through a superior-subordinate relationship and compliance with the orders within the structure of the superior-subordinate relationship.<sup>1418</sup> An organisational relationship was also established in *Thomas* where Accused 1 was on top of the hierarchal structure and conducted his criminal affairs through fear in such a manner that compliance with his orders would be guaranteed. It is however not argued that this fear resulted in a lack of capacity such as with an innocent agent. Once again, if the Court had found there to be no “enterprise” on the facts, a conviction in terms of section 2(1)(f) of POCA would not have been possible. An “organised and hierarchal apparatus of power” which is an admittedly flexible and broad concept, is sufficient under indirect perpetration.

The third requirement (also mentioned in *Katanga & Chui*) is that there be an “automatic compliance” with the orders of the superior and if a subordinate (a mere “cog” in the machinery) is unable to execute a criminal task, another will execute it in his or her place.<sup>1419</sup> This requirement was however not apparent in *Dyilo* 2006 and the third requirement, which was more of a mental element, was rather proof that the accused was aware of his role within the organisation and actively used his authoritative role.<sup>1420</sup>

It is not apparent whether the orders given by Accused 1 in *Thomas* were exercised with “automatic compliance”. The level of fear of and respect for Accused 1 was however apparent as well as the power dynamics within the gang, and therefore an argument that such compliance was present, may be convincing. Wijnberg’s utilisation of Maslow’s motivation theory also illustrates the psychological control gang leaders have over gang members and their need to serve a gang. Compliance could arguably therefore be guaranteed by a gang member’s survival instinct and need to remain in the gang to fulfil his or her needs.

The *particular* usefulness and application of this doctrine is centred on two reasons. Firstly, it does not rely on legal technicalities such as “criminal gang”; a “pattern of criminal gang activities”; enterprise or “pattern of racketeering activities”. A court must

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<sup>1418</sup> *Katanga & Chui* para 511-513.

<sup>1419</sup> *Katanga & Chui* paras 515-517.

<sup>1420</sup> *Dyilo* 2006 at para 95.

merely establish the existence of a hierarchal organisation. The second important field of applicability is related to the first in that it imputes liability to the leader even in instances where there is an innocent agent (the subordinate gang member). This may also include youth gang members whose charges are diverted in terms of the Child Justice Act 75 of 2008. A gang leader could therefore, even in instances where no pattern (of racketeering or gang activities) could be established on the facts, still be held responsible.

Also, where no one could be held legally liable for the underlying predicate offences – but factually crimes were committed within a criminal apparatus – liability could ensue if it can be established that gang leader had control over the criminal gang and thus committed crimes *through* that gang. Proving a pattern of criminal gang activity or racketeering activity in the context of bigger gangs such as the Americans, where certain off-shoots have reached over 5 000 members each (so-called “supergangs”),<sup>1421</sup> may prove extremely problematic. Additionally, there is no need to prove that the gang leader had in fact instructed specific offences or a series of offences. His or her mere position of authority would be sufficient to establish criminal liability, which would therefore also resolve difficulties surrounding incitement and conspiracy.

## 6 5 Evaluation: criminal responsibility of gang leaders through the lens of international criminal law

The preceding discussion illustrates the potential for the development of South African criminal law, under the influence of international criminal law. Command responsibility and control through an organisation both have related, but dissimilar doctrines in South African law which may be developed to incorporate or accommodate modes of liability suitable for group-based and structural criminality, such as criminal groups and gangs. In this regard, the discussion under 6 4 1 5 3 provided a framework for holding gang leaders responsible through command responsibility, founded in the legal duty emanating from the creation of a dangerous situation combined with failure to prevent harm from ensuing. The case of *Thomas* illustrates the type of factual matrix where liability based on the control-theory (or any

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<sup>1421</sup> See 2 2, 4 4 1 as well as 4 5 1 1 1 above.

of the leadership modes of liability) would be most applicable and indeed useful in the fight against the structures that make criminal gangs possible.

## 6.6 Alternative foreign law measures addressing involvement or participation in organised criminal groups

This section investigates alternative models for criminalising or limiting participation in organised criminal groups. Some of these models do not in themselves carry criminal sanctions but involve the limitation of civil liberties by proscribing certain conduct with the hope of upsetting the effective functioning of the organised criminal group. Certain models may also be substantially similar to existing modalities under South African law but have not yet found application in the provincial or national anti-gang strategies. The ultimate purpose is to gain insight into these models and make proposals for adoption into our legislative regime to either replace, develop or supplement the crimes contained in POCA as well as the common law.

There are four main models addressing or criminalising organised criminal structures. These models<sup>1422</sup> are the conspiracy model;<sup>1423</sup> the participation model;<sup>1424</sup> the enterprise (or RICO) model<sup>1425</sup> and the labelling/registration models.<sup>1426</sup>

POCA is constructed on the participation model, which, is based on STEP (which in turn is based on RICO). As Schloenhardt points out, legislation based on this model is based on two fundamental physical or objective elements: the existence of a criminal group or organisation and the participation therein.<sup>1427</sup> These models shall not be

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<sup>1422</sup> See A Schloenhardt *Palermo on the Pacific Rim: Organised Crime Offences in The Asia Pacific Region* (2009) 15-17.

<sup>1423</sup> As described in the Palermo Convention and found in Australia, Singapore and Malaysia. See Schloenhardt *Organised Crime Offences* (2009) 15. Also see R Earis "Participating in the activities of an organised crime group: the new offence" (2015) 10 *Criminal Law Review* 766 766-767.

<sup>1424</sup> Also found in the Palermo Convention, the US STEP Act, Canada, New South Wales, New Zealand and Taiwan. See Schloenhardt *Organised Crime Offences* (2009) 15. Also see Earis (2015) *Criminal Law Review* 767.

<sup>1425</sup> The most well-known example being the United States RICO Act. Also see Earis (2015) *Criminal Law Review* 767-769.

<sup>1426</sup> The most well-known example being the United States RICO Act.

<sup>1427</sup> Found in jurisdictions such as New South Wales, Hong Kong, Japan and South Australia. See Schloenhardt *Organised Crime Offences* (2009) 15. Also see Earis (2015) *Criminal Law Review* 769-770.

<sup>1428</sup> Schloenhardt *Organised Crime Offences* (2009) 265.

discussed further in this Chapter as this model has been comprehensively discussed in Chapter 3, where prominent examples of the participation model such as STEP and the Canadian Criminal Code were discussed as comparative and interpretive tools for understanding Chapter 4 of POCA.<sup>1428</sup> Suggestions for certain amendments to the text and structure of POCA are also based on nuances found in these models.

The conspiracy model is also not unknown to South Africa and is manifested in section 18(2)(a) of the Riotous Assemblies Act 17 of 1956. Conspiracy-based liability is one of the accepted strategies to combat organised criminality, as is evident from the Palermo Convention, article 5(1)(a)(i). However, some commentators, like Schloenhardt find the inclusion of conspiracy-based strategies surprising, as was also pointed out in Chapter 3.<sup>1429</sup> This criticism is based on the observation that it is generally difficult to secure a conviction under the conspiracy model due to lack of proof of an explicit agreement between the parties.<sup>1430</sup>

The enterprise model is also known to South Africa and is found in Chapter 2 of POCA dealing with racketeering. The participation and enterprise models are substantially similar and STEP is in fact an off-shoot of RICO, which is the preeminent enterprise modality.<sup>1431</sup> The focus here is the criminal enterprise and the criminal activities that flow therefrom.<sup>1432</sup> Chapter 2 of POCA was also discussed in its application in the anti-gang context (being traditionally associated with white collar crime rather than gang, or “street” crime).<sup>1433</sup>

It is clear that three of the four main models are sufficiently represented in South African law. There is therefore no need for a comprehensive discussion of these models in the context of this dissertation. As mentioned, they serve an interpretive function and nuanced provisions have been highlighted. The only models that do not

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<sup>1428</sup> See 4 3 1 and 4 3 4 above.

<sup>1429</sup> See 4 3 above.

<sup>1430</sup> Schloenhardt *Organised Crime Offences* (2009) 264.

<sup>1431</sup> See SG Lebeya *Defining organised crime: a comparative analysis* LLD thesis UNISA (2012) 104; DC Van der Linde *in Patroon van kriminele bende-aktiwiteite: Die oplossing tot Suid Afrika se bendemisdaad of 'n wit olifant? 'n Kritiese, regsvergelykende en konstitusionele studie van Hoofstuk 4 van die Wet op die Voorkoming van Georganiseerde Misdaad 121 van 1998* Unpublished LLM dissertation (2015) 9 fn 18. Also See 4 2 fn 497 above.

<sup>1432</sup> A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) 13; Schloenhardt *Organised Crime Offences* (2009) 269.

<sup>1433</sup> See 4 4 above.

find particular application are the labelling and registration models. These models will therefore be analysed in detail below.

### 6 6 1 *Labelling or registration model*

Recently there have been calls for the harsher criminalisation of gangs, including criminalising mere gang membership.<sup>1434</sup> In some foreign jurisdictions the strategy is known as “labelling” or “registration”; concepts not yet part of South African criminal law lexicon.

A puzzling interaction during a meeting of the Parliamentary Committee on Police, which included a discussion on the anti-gang strategy of the country, took place on the 23<sup>rd</sup> of August 2017. Deputy National Commissioner of Policing, Lieutenant General Masemola, indicated that there might be a need for stronger legislation dealing with the gang problem in the country. In response, acting National Police Commissioner, Lt Gen Mothiba, suggested that the answer could be “legislation which outlawed the formation and membership of a gang”.<sup>1435</sup> An ANC MP, Mr Ramatlakane, was however “surprised” to hear of these suggestions and asserted (wrongly) that “[t]hese powers in law exist” and that there were over ten gangs that were subjected to this “law” including the Americans. The MP called for the implementation of these “judgments” and “precedents” by authorities.<sup>1436</sup> The misguided views and assumptions expressed by this particular member of the legislature is perhaps indicative of a broader and deeper misapprehension of what tools South African criminal law currently has in terms of the prevention and punishment of criminal gang activities. POCA, the preeminent legislative tool in the fight against criminal gang activities, certainly does not criminalise mere gang membership, as we have seen throughout this dissertation. There is also no precedent under the common law through judicial pronouncement

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<sup>1434</sup> Parliamentary Committee meeting on Police “Hawks Illegal Firearms Unit; SAPS Anti-Gang Strategy; Quarter 1 performance; Vetting Senior Management” *Parliamentary Monitoring Group* (23-08-2017) <<https://pmg.org.za/committee-meeting/24881/>> (accessed 06-09-2017). Also see C Dolley “Police ‘confused’ over national gun probe and anti-gang law” (06-09-2017) *News24* <<http://www.news24.com/SouthAfrica/News/police-confused-over-national-gun-probe-and-anti-gang-law-20170906>> (accessed 06-09-2017).

<sup>1435</sup> Parliamentary Committee meeting on Police “Hawks Illegal Firearms Unit; SAPS Anti-Gang Strategy; Quarter 1 performance; Vetting Senior Management” *Parliamentary Monitoring Group*.

<sup>1436</sup> Parliamentary Committee meeting on Police “Hawks Illegal Firearms Unit; SAPS Anti-Gang Strategy; Quarter 1 performance; Vetting Senior Management” *Parliamentary Monitoring Group*.

establishing such a principle.<sup>1437</sup> The closest may be public nuisance remedies, but at the time of writing this dissertation, no judicial pronouncement could be found utilising public nuisance remedies in the anti-gang context.<sup>1438</sup> But even a judgment based on public nuisance would not outlaw “the formation and membership of a gang”. This is something more reminiscent of a labelling model.

Labelling and registration provide simple, yet arguably draconian methods to curb unlawful organisations by employing a “two-tier system”: firstly, prohibition of certain organisations or activities by name, and secondly the criminalisation thereof.<sup>1439</sup>

The registration model is also described as the negative model while labelling is sometimes referred to as the positive model.<sup>1440</sup> Registration creates a “negative prohibition” by criminalising unregistered organisations while labelling requires a government to actively declare an organisation as unlawful.<sup>1441</sup>

Some comparative examples of these models are briefly discussed below.

#### **6 6 1 1      *Registration (negative model): Singapore***

The Singaporean Societies Act 56 of 1966 (“Societies Act”) requires that all organisations within the jurisdiction be registered. Non-compliance with this requirement renders the organisation *ipso facto* unlawful.<sup>1442</sup> The Societies Act places a legal duty on the types of societies listed in the Schedule to the Act (except those listed in section 2) to register such a society. Every unregistered society shall consequently be deemed to be an unlawful society.<sup>1443</sup> A society is defined as including “(...) any club, company, partnership or association of ten or more persons, whatever its nature or object”, subject to the exclusions in section 2. A prominent and

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<sup>1437</sup> Also see Dolley “Police 'confused' over national gun probe and anti-gang law” *News24* where it was sensationally and erroneously reported that

[t]wo of the country's top police officers, including the national commissioner, appear oblivious to stringent anti-gang laws, according to a report on a recent meeting [...]

The author of that article is referring to the non-existent laws as described above.

<sup>1438</sup> See 6 6 1 5 1 for a discussion on public nuisance remedies in the South African context.

<sup>1439</sup> Schloenhardt *Organised Crime Offences* (2009) 272.

<sup>1440</sup> Schloenhardt *Organised Crime Offences* (2009) 273.

<sup>1441</sup> Schloenhardt *Organised Crime Offences* (2009) 272.

<sup>1442</sup> Schloenhardt *Organised Crime Offences* (2009) 273.

<sup>1443</sup> See section 14 of the Societies Act.



relevant ground for refusal is where the Registrar is satisfied that the particular society “is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order”.<sup>1444</sup>

The Societies Act make use of several legal presumptions that place a reverse onus on the accused charged with being involved with an unlawful association that will alleviate the evidential burden of the prosecution. Section 21, *inter alia*, provides that any person in possession of accounts, banners, insignia, books, writings or seals (hereafter generically referred to as “paraphernalia”) relating or purporting to relate to an unlawful society, shall be presumed to be a member of that society.<sup>1445</sup> That section furthermore states that a society shall also be presumed to be in existence at the time that the paraphernalia was found. An even harsher presumption is the subsequent provision which holds that a person found in possession of paraphernalia shall also be presumed to be involved in the management of the society.<sup>1446</sup>

#### **6 6 1 2      *Labelling (positive model): New South Wales***

Anti-gang legislation is often inspired by a series of events which awakens public outcry, followed by governmental intervention, such as with California and South Africa.<sup>1447</sup> In the case of New South Wales (“NSW”) in Australia, the Crimes (Criminal Organisations Control) Act 2009 No 6 was inspired by a single event, followed by a wave of similar legislation being passed throughout Australia.<sup>1448</sup> An incident at the Sydney airport in 2009 where a member of a biker gang killed a rival gang member (which led to several public shootings) prompted the NSW Prime Minister to meet with the police commissioner the very next day to discuss legislative intervention to

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<sup>1444</sup> Section 4(2)(b) of the Societies Act.

<sup>1445</sup> Section 21(1) of the Societies Act.

<sup>1446</sup> Section 21(2) of the Societies Act.

<sup>1447</sup> See Chapter 4 2 of this dissertation for the South African background and 4 3 4 for the Canadian context.

<sup>1448</sup> R Ananian-Welsh “‘If at first you don’t succeed...’: Effectiveness and the evolution of preventive organised crime measures” in T Tulich, R Ananian-Welsh, S Bronitt & S Murray (eds) *Regulating Preventive Justice: Principle, Policy and Paradox* (2017) 177 181-183.

criminalise outlaw biker gangs.<sup>1449</sup> The original version of the legislation (which has subsequently been repealed and replaced with the Crimes (Criminal Organisations Control) Act 2012 No 9 (“COCA”))<sup>1450</sup> was broad and sweeping in its application; the aim of it was unambiguously stated as a legislative intervention to combat motorcycle gangs.<sup>1451</sup> Remaining Australian states that did not adopt similar legislation soon did so in order to prevent being labelled as “safe havens” for these motorcycle gangs. These states could also no longer wait to act on the usual justification of “grave and imminent threats” presented by such gangs.<sup>1452</sup> The legislation is based on the anti-terrorism laws of Australia which in turn were crafted after those implemented by the United Kingdom, and provide a civil mechanism for disrupting organised crime structures.<sup>1453</sup> And as Martin suggests, the focus of the Australian states has shifted away from combatting terrorism to curbing organised crime – under the guise of “preventative justice”.<sup>1454</sup>

In order to effect the “labelling” of a criminal gang, a responsible authority would firstly label or declare certain organisations as unlawful. The commissioner of police

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<sup>1449</sup> Debates of the Legislative Assembly of New South Wales of 2009: 2 April 2009; D Welch, L Kennedy & E Harvey “Bikie killed in Sydney Airport brawl” (23-03-2009) *The Sydney Morning Herald* <<http://www.smh.com.au/national/bikie-killed-in-sydney-airport-brawl-20090322-95xc.html>> (accessed 17-07-2017); Ananian-Welsh “Preventative organised crime measures” in *Regulating Preventative Justice* 183.

<sup>1450</sup> Crimes (Criminal Organisations Control) Act 2009 No 6.

<sup>1451</sup> See T Gavin “Extending the Reach of Kable: *Wainohu v New South Wales*” (2012) 34 *Sydney Law Review* 395 396 where the author refers to the comments made by the former Prime Minister.

<sup>1452</sup> Ananian-Welsh “Preventative organised crime measures” in *Regulating Preventative Justice* 183.

<sup>1453</sup> See Division 104 of the Australian Criminal Code of 1900. See generally C Walker “The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!” (2013) 37 *Melbourne University Law Review* 143; R Ananian-Welsh & G Williams “The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia” 38 (2014) *Melbourne University Law Review* 362 363-364. In a 2008 Australian News programme, *Law Report*, the former Premier of South Australia, Mike Rann, stated that “[w]e’re allowing similar legislation to that that applies to terrorists, because these people are terrorists within our community” (Law Report “South Australia’s plans to obliterate outlaw bikie gangs” (06-05-2008) *ABC* <<http://www.abc.net.au/radionational/programs/lawreport/south-australias-plans-to-obliterate-outlaw-bikie/3254212#transcript>> (accessed 04-09-2017)). Also see G Williams “A Decade of Australian Anti-Terror Laws” 35 (2011) *Melbourne University Law Review* 1136 1169.

<sup>1454</sup> G Martin “Outlaw Motorcycle Gangs and Secret Evidence: Reflections on the Use of Criminal Intelligence in the Control of Serious Organised Crime in Australia” 36 *Sydney Law Review* (2014) 501 515-516. Also see Ananian-Welsh & Williams (2014) *Melbourne University Law Review* 365-375 for an overview of Australia’s anti-terrorism approach.

may apply for an organisation (referred to as the “respondent”)<sup>1455</sup> to be declared as a criminal organisation in terms of Part 2 of COCA.<sup>1456</sup> The application must contain certain information but most importantly is the identification of the organisation; the description of the nature of that organisation as well as its distinguishing characteristics; the grounds on which the declaration is sought as well as information supporting those grounds.<sup>1457</sup> The court must be satisfied of three things before making a declaration: that the respondent is an organisation;<sup>1458</sup> the members of that organisation “associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity”;<sup>1459</sup> and finally that the continued existence of the organisation is “an unacceptable risk to the safety, welfare or order of the community in [NSW]”.<sup>1460</sup> A declaration may be made in the absence of the respondent and regardless of whether any submissions are made by the respondent.<sup>1461</sup>

The meaning of “associate with”, “member”, “organisation” and “serious criminal activity” are important in this regard. Persons “associate with” each other when they are in the company of one another or communicate by any means including mail, fax or “any form of electronic communication”.<sup>1462</sup> A member of a criminal organisation, furthermore, is in the case of a body corporate a director or officer of said body corporate. In all other instances he or she may be an associate or prospective member; or a person who identifies themselves as belonging to that organisation or is treated by the organisation or persons belonging to that organisation in such a way as *if* he or she did belong to that organisation.<sup>1463</sup> An organisation is any unincorporated or incorporated group, which is structured in any fashion and may consist of persons based outside NSW or persons not ordinarily resident in NSW.<sup>1464</sup> “Serious criminal activity” refers mainly to an array of drug and drug trafficking offences and to a far

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<sup>1455</sup> See section 5(1) of COCA.

<sup>1456</sup> Section 5 COCA.

<sup>1457</sup> Sections 5(2)(b)-(e) COCA.

<sup>1458</sup> Section 7(1)(a) of COCA.

<sup>1459</sup> Section 7(1)(b) of COCA.

<sup>1460</sup> Section 7(1)(c) of COCA.

<sup>1461</sup> Section 7(3) of COCA.

<sup>1462</sup> Section 3 of COCA.

<sup>1463</sup> Section 3 of COCA.

<sup>1464</sup> Section 3 of COCA.

lesser extent firearm-related offences and contact and financial crimes.<sup>1465</sup> Obtaining a material benefit from the aforementioned conduct would also constitute a serious criminal activity – regardless of whether that person has been prosecuted and convicted, prosecuted and acquitted or even where he or she has been convicted and that conviction has been set aside.<sup>1466</sup> A material benefit is money or contingent benefit.<sup>1467</sup>

A court may regard a list of factors contained<sup>1468</sup> in COCA for purposes of declaring an organisation a criminal organisation. This includes “any information” that suggests a link between the organisation in question to serious criminal activity in NSW<sup>1469</sup> or the fact that there are recorded criminal convictions against any current or former members of said organisation in NSW.<sup>1470</sup> The Act also confers a wide discretion to the judge allowing him or her to consider any other matter they deem relevant.<sup>1471</sup> The jurisdictional application of COCA is wide considering it has extraterritorial operation “to the full extent of the extraterritorial legislative capacity of the Parliament”.<sup>1472</sup>

Under Part 3 of COCA a court may make a control order against members or associates of a declared organisation. The court must be satisfied (based on sufficient grounds)<sup>1473</sup> that the relevant person is a member of the particular declared organisation<sup>1474</sup> or who purports to be a former member of said organisation but has

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<sup>1465</sup> Section 3 of COCA read with section 6 of the Criminal Assets Recovery Act No 23 of 1990 (“the Recovery Act”). Subsections (2)-(4) are predominantly drug-related offences with a few exceptions such as section 6(2)(f) which states that a serious offence is an offence which carries at least a five-year prison sentence and where the crime involves acts such as violence, murder or financial crimes such as money laundering or fraud.

<sup>1466</sup> Section 3 of COCA.

<sup>1467</sup> Section 249A read with section 93TA of the Crimes Act 40 of 1900.

<sup>1468</sup> In section 7(2) COCA.

<sup>1469</sup> Section 7(2)(a)(i) COCA.

<sup>1470</sup> Section 7(2)(a)(ii) COCA.

<sup>1471</sup> Section 7(2)(b) COCA.

<sup>1472</sup> Section 4 COCA.

<sup>1473</sup> 19(1)(b) of COCA.

<sup>1474</sup> Section 19(1)(a)(i) of COCA.

ongoing involvement with the organisation and its activities.<sup>1475</sup> Procedures are also available for appeals,<sup>1476</sup> variations<sup>1477</sup> or relief in cases of hardship.<sup>1478</sup>

The effect of the control order would seem to harshly impede the freedom of association of the named persons. The High Court of Australia in *Wainohu v New South Wales* (“*Wainohu*”)<sup>1479</sup> however found that this impediment was associated with the legitimate governmental goal of targeting organised crime which has taken on a sophisticated nature, characterised by its high incidence.<sup>1480</sup> The constitutionality of these measures will be discussed briefly below.<sup>1481</sup>

The goal of these control orders is, at least ostensibly, to prevent individual members from associating with one another and consequently impeding the functionality of the criminal organisation.<sup>1482</sup> In fact, it carries a two-year prison sentence when two members of a declared organisation under a control order associate with each other.<sup>1483</sup> It is a separate offence for two controlled members of a declared organisation to associate with each other on three or more occasions within a period of three months. This carries a maximum prison sentence of three years.<sup>1484</sup> The NSW Legislature made sure that it was sending a clear message when it also

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<sup>1475</sup> Section 19(1)(a) (ii) of COCA.

<sup>1476</sup> Section 24 provides the right of appeal. Both the Commissioner and controlled person may make this appeal. The heading of this section is somewhat misleading as section 24(2) restricts this “right”. The *right* of appeal however only pertains to a question of *law*. Leave to appeal has to be granted in order for a court to consider the appeal based on a question of fact. Section 24(4) furthermore makes it clear that lodging an appeal does not affect the operation of that control order. Section 24(5) states the control order may be confirmed, varied or reversed by the court of appeal and that court may also make “any consequential or ancillary order”.

<sup>1477</sup> Section 25 of COCA enables the Commissioner or affected person to apply for the variation of a control order. This variation may be granted (in terms of section 25(2)) if there has been “a substantial change in the relevant circumstances since the order was made or last varied”.

<sup>1478</sup> Section 18(1) and (2) of COCA provides for an expedited hearing if a controlled member of an organisation would suffer “extreme hardship” if the hearing were to take place on the original specified date.

<sup>1479</sup> (2011) 278 ALR 1.

<sup>1480</sup> *Wainohu* para 8.

<sup>1481</sup> See 6 5 1 5 3.

<sup>1482</sup> *Muratore v Commissioner of Police NSW Police Force* [2017] NSWCATOD 3 para 77.

<sup>1483</sup> Section 26(1) of COCA. Section 26(2) further holds that it is irrelevant (for the purposes of section 26) whether the relevant member under a control order is associating with the same person or different people.

<sup>1484</sup> Section 26(1A) of COCA.

made it a separate offence for a controlled member of a declared organisation (after having been convicted of an offence under this section) to associate with another controlled member.<sup>1485</sup> Recruitment of persons to join the declared organisation is also prohibited and carries a prison sentence of five years.<sup>1486</sup>

COCA further impedes civil liberties by limiting a person's freedom to partake in labour activities. Section 27 holds that any activity that requires some sort of authorisation (such as licences, registration or certifications)<sup>1487</sup> to carry on a "prescribed activity"<sup>1488</sup> is automatically suspended when an interim control order is granted against a person. A prescribed activity mainly relates to occupations that require governmental approval, involvement or regulation such as the sale of liquor or the operation of a casino or the possession of firearm or conducting business as a firearms dealer.

A labelling model such as in NSW takes a distinctly pro-active approach in comparison to a model such as POCA. With POCA, there is nothing truly inhibiting or impeding the criminal structure – which is truly the aim with COCA. Once a group has been identified and declared as criminal, they greatly cease to be functional due to the severe restrictions placed upon them by the control orders. By comparison, gang members who are convicted under POCA (or other statutory or common law measures) are merely replaced by new recruits. Imprisoned gang members are then further recruited into prison gangs; only to continue the cycle of gangsterism upon release.

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<sup>1485</sup> Section 26(1B) of COCA.

<sup>1486</sup> Section 26A of COCA. "Recruiting" is defined as *including* to "counsel, procure, solicit, incite or induce" in section 26A(2).

<sup>1487</sup> Section 27(6) of COCA.

<sup>1488</sup> The list of prescribed activities is listed in section 27(6)(a)-(m). Occupation is also defined (albeit somewhat circularly) in section 27(6) as "[meaning] an occupation, trade, profession or calling of any kind that may only be carried on by a person holding an authorisation". Even though the scope of the crimes is relatively broad, it is not beyond the scope of what one would expect to be encompassed in the activities of an organised criminal group, save for one or two curious inclusions. There is, interestingly, an absence of a prohibition on any careers involving interaction with pharmaceuticals. There is however a prohibition on carrying on a tattoo business or "performing body art tattooing procedures" (section 27(j1)) and participating or promoting in combat sports (section 27(l1)). The inclusion of these occupations or industries seems to be reinforcing certain stereotypes of gangs and criminal organisations rather than having a rational basis for inclusion.

Although the Australian approach is functional, even chilling, it is quite obviously draconian and limits several constitutional liberties. This shall be explored further below.

### **6 6 1 3      *Civil law injunctions***

A less invasive method than the above discussed COCA, is civil injunctions under US law. Civil law injunctions for gangs became vogue in the 1980s – just prior to the enactment of STEP.<sup>1489</sup> These injunctions provide a mechanism in civil law to address “street gangs” by the lower (civil) standard of proof, compared to the procedural and constitutional safeguards enshrined in criminal law.<sup>1490</sup> The ensuing sections empower civil law injunctions against gangs under the broad umbrella of public nuisance. Under the common law, actions would have constituted a public nuisance (as a tort or crime) if they interfered with some community interest such as interference with public health, safety, morals, comfort or another miscellaneous right.<sup>1491</sup> The individual states of the US have largely codified their criminal law but it has been noted that public nuisance offences are often worded unconstitutionally broadly and even in some instances not defining the term “public nuisance” at all.<sup>1492</sup>

Section 3479 of the Californian Civil Code (“the Californian Code”) defines the term “nuisance” as follows:

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Section 3480 further defines a “public nuisance” as:

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<sup>1489</sup> LA Hughs & JF Short “Youth Gangs and Unions: Civil and Criminal Remedies” (2006) 9(4) *Trends in Organized Crime* 43 49.

<sup>1490</sup> ACLU “Gang Injunctions Fact Sheet” (05-2010) <<https://www.aclunc.org/article/gang-injunctions-fact-sheet>> ACLU (accessed 25-06-2017); Hughs & Short (2006) *TOC* 50.

<sup>1491</sup> M Shiner *Gang Injunctions: A Guide for Prosecutors* (2009) 3.

<sup>1492</sup> Shiner *Gang Injunctions* 3-4.



A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

City or district attorneys will gather evidence from police officers in the affected areas to establish their case against individual gang members.<sup>1493</sup> This would usually include evidence of the criminal history of the individual gang members or suspected gang members. This is supplemented by statements by community members of affected areas and they are requested to illustrate specific instances of where the gang or gang members have acted in a way as to constitute a “public nuisance”.<sup>1494</sup> The evidence from the aggrieved parties is then compiled and drafted into an injunction listing the names of the relevant (alleged) gang members who have been identified as a “public nuisance”. This draft injunction must then delineate the area which they may not trespass upon. The city or district attorney must then, also, include the prohibited *conduct* in which the persons named in the injunction may not participate or engage.<sup>1495</sup>

A gang injunction may contain several types of provisions or prohibitions. In addition to quite obviously prohibiting illegal activities, the injunction may also aim to prohibit legal and innocent activities.<sup>1496</sup> The American Prosecutors Research Institute (“APRI”) identified eleven of the most common provisions with the most effective being the so-called “do not associate” provision.<sup>1497</sup> This provision strikes at a criminal gang’s ability to congregate, thus affecting the collective danger they pose. These provisions are however shockingly broad and prohibit an (alleged) gang member from “[d]riving, standing, sitting, walking, gathering or appearing, anywhere in public view

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<sup>1493</sup> Section 731 of the Californian Civil Code of Procedure empowers to bring this action on behalf of the affected people. See Shiner *Gang Injunctions* 7; CL Maxson, KM Henningan & DC Sloane “‘It’s Getting Crazy Out There’: Can a Civil Gang Injunction Change a Community?” (2005) 4 *Criminology & Public Policy* 577 580.

<sup>1494</sup> Maxon et al (2005) *CPP* 580.

<sup>1495</sup> Maxon et al (2005) *CPP* 580

<sup>1496</sup> Hughs & Short (2006) *TOC* 50. The American Civil Liberties Union (“ACLU”) for example points out that people spotted taking the bus or picking up someone from work would constitute a violation of the injunction. See ACLU “Gang Injunctions Fact Sheet” (05-2010) *ACLU*. This then has quite patent constitutional imperatives that will be discussed below.

<sup>1497</sup> Shiner *Gang Injunctions* (2009) 13.

or anyplace accessible to the public, with any known [gang] member (...).<sup>1498</sup> This prohibition shall however not apply when the gang members are attending school or inside a church. It shall, nevertheless, still apply when travelling to or from those locations.<sup>1499</sup>

A non-intimidation provision prohibits gang members from harassing, threatening, provoking, assaulting or battering persons that may be witnesses against a gang or who have made a complaint against such a gang.<sup>1500</sup> A court may also issue an injunction containing a prohibition against forcible recruitment which includes verbal threats, acts of physical violence or property damage.<sup>1501</sup> Gang members may also be prohibited from preventing a member from leaving a gang. This includes acts of physical violence or property damage towards such persons.<sup>1502</sup>

Other restrictions include a prohibition on graffiti or the use of graffiti tools; abiding by a curfew (subject to legitimate exceptions such as the practice of an occupation or emergency); abstaining from drugs or alcohol; not trespassing on private property; and a catch-all provision which stipulates that all laws regarding a certain crime must be obeyed (for example all laws regarding murder, assault or rape must be obeyed).<sup>1503</sup>

The APRI however does caution prosecutors to carefully draft injunctions which are specifically tailored to the specific gang in order to avoid vague and overbroad injunctions. Concerns about potential vagueness and overbreadth of injunctions will further be elaborated on below.

A presiding officer may make a judgment based on the information provided to him or her by the interested parties mentioned above. The line between civil and criminal will be traversed as soon as the injuncted party violates the provisions contained in the injunction as they may face imprisonment or a fine.<sup>1504</sup>

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<sup>1498</sup> Shiner *Gang Injunctions* (2009) 13.

<sup>1499</sup> Shiner *Gang Injunctions* (2009) 13.

<sup>1500</sup> Shiner *Gang Injunctions* (2009) 13-14.

<sup>1501</sup> Shiner *Gang Injunctions* (2009) 15.

<sup>1502</sup> Shiner *Gang Injunctions* (2009) 15.

<sup>1503</sup> Shiner *Gang Injunctions* (2009) 14-15.

<sup>1504</sup> Hughs & Short (2006) *Trends in Organized Crime* 50.

## **6 6 1 4      *An overview of problems with control orders and civil law injunctions***

### **6 6 1 4 1      *Control orders***

COCA utilises a model with very clear albeit constitutionally suspect definitions. All the key terms are defined with reasonable certainty which makes the opportunity for judicial or prosecutorial overreach less likely. The 2009 version of COCA was repealed in its entirety and replaced with the current version. The High Court of Australia in *Wainohu*<sup>1505</sup> unanimously found that there was no violation of the right to freedom of association, which, it seems, is at most a corollary right flowing from the right to political communication and freedom of association.<sup>1506</sup> It was additionally held that there were in any case protection mechanisms in the Act to prohibit such infringements if they should occur, such as the variation of the control order or an order permitting controlled members to associate with one another from “good reason”.<sup>1507</sup> Heydon J also held that these implied constitutional rights only relate to the system of effective and responsible government and that no such general right exists.<sup>1508</sup>

Several empirical studies have been conducted on the effectiveness of civil injunctions and thus the focus of the discussion will be on the problems related to them. Many of these critiques however apply equally to control orders due to the similarity between control orders and injunctions.<sup>1509</sup>

### **6 6 1 4 2      *Civil law injunctions***

The main problem with these injunctions is that they are ripe for prosecutorial abuse, partially due to the lower standard of proof as well as their overbroad application and infringement upon civil liberties. It has additionally been argued that

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<sup>1505</sup> (2011) 278 ALR 1.

<sup>1506</sup> *Wainohu* paras 112-114 per Gummow J, Hayne J, Crennan J and Bell J; para 72 French CJ and Kiefel J concurring with the aforementioned conclusion. Also see the judgement of Heydon J coming to the same conclusion as the majority.

<sup>1507</sup> *Wainohu* paras 113; 186.

<sup>1508</sup> *Wainohu* para 186.

<sup>1509</sup> For a more detailed discussion on the issues with control orders, see Ananian-Welsh & Williams (2014) *Melbourne University Law Review* 362-408; D Hume “The Rule of Law in Reading Down: Good Law for the ‘Bad Man’ (2014) 37 *Melbourne Law Review* 620 651-659.

these injunctions in fact enhance cohesiveness within the gang and hostility toward police officials.<sup>1510</sup>

Alleged gang members often reoffend, pointing towards the possible ineffectiveness of injunctions. Myers points to a review of gang injunctions that indicated that almost 80% of gang members listed in an injunction were convicted of a crime after said injunction was issued against them.<sup>1511</sup> More than half of the aforementioned gang members committed a crime within the area in which the injunction was operative.<sup>1512</sup> This points towards three problems. The first glaring issue is the re-offence rate despite having injunctions issued against alleged gang members. A second collateral issue is that gang members venture to areas adjacent to areas that they may have been enjoined to congregate in.<sup>1513</sup> A third collateral issue (identified by law enforcement) is that, after injunctions have been issued, law enforcement officers are uncertain as to the whereabouts of gang members. It has been noted that police enforcement would at least, to a certain extent, be able to keep track of gang members if they are known to congregate at certain areas. After an injunction has been issued, they are required to disperse and seek new areas to congregate or enter new areas.<sup>1514</sup>

Injunctions quite obviously give rise to constitutional issues considering the invasive and extreme impact on civil liberties. They may constitute a *prima facie* infringement

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<sup>1510</sup> TA Myers "The unconstitutionality, ineffectiveness, and alternatives of gang injunctions" (2008-2009) 14 *Michigan Journal of Race and Law* 285-287; J Greene & K Pranis *Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies* (2007) 5.

<sup>1511</sup> Myers (2008-2009) *Michigan Journal of Race and Law* 297.

<sup>1512</sup> Myers (2008-2009) *Michigan Journal of Race and Law* 297; D Hale "Gang Injunction: 300 black men targeted" (20-10-2006) <[http://www.streetgangs.com/injunctions/102006\\_300\\_black\\_men\\_targeted#sthash.NHKv2NY7.dpb](http://www.streetgangs.com/injunctions/102006_300_black_men_targeted#sthash.NHKv2NY7.dpb)> *Streetgangs.com* (accessed 30-09-2017).

<sup>1513</sup> Myers (2008-2009) *Michigan Journal of Race and Law* 297-299. The study conducted by the ACLU indicated that there was a sharp rise in crime within the four districts north of the district that had issued a gang injunction. The four districts saw an 86% increase from 55 (in February) to 108 (in June) violent crimes. See Greene & Pranis *Gang Wars* (2007) 38 (Figure 3-1). Myers also points out that the reporting district southeast of the enjoined district also saw a rise in violent crime and experienced more incidents the month the injunction was issued (April 1993) than the year prior to or after the injunction was issued. See Myers (2008-2009) *Michigan Journal of Race and Law* 298; Greene & Pranis *Gang Wars* (2007) 26 (Figure 2-37). This assertion does however not seem to be accurate, as there was another spike in violent crime in July 1994.

<sup>1514</sup> Myers (2008-2009) *Michigan Journal of Race and Law* 297-298.

on freedom of association, which is protected by the First Amendment to the US Constitution.<sup>1515</sup> The Supreme Court of California addressed this issue in *People ex rel. Gallo v. Acuna* (“*Acuna*”).<sup>1516</sup> The Court held that the Constitution only provides a limited association right and not “a generalized right of ‘social association’”.<sup>1517</sup> Brown J distinguished between intrinsic or intimate associations and instrumental associations. The latter associations are required in the exercise of political and religious expression while the former protect personal and familial affiliations such as marriage.<sup>1518</sup> The Court rejected the proposition that specific street gangs fall within either sphere of these two categories or that they are formed for the purpose of participating in these protected activities.<sup>1519</sup> The First Amendment could not be invoked to protect people “(...) ‘for the purpose of depriving third parties of their lawful rights.’”<sup>1520</sup>

Attacks due to the overbroad and vague wording of an injunction may also arise. These attacks were raised by the defendants in *Acuna*. Concerning overbreadth, Brown J held that there was no overbreadth to speak of. For it to qualify as such, the ambit of the injunction must have a “chilling” effect on First Amendment Rights of third parties who were not named in the injunction or before the Court.<sup>1521</sup> The Court noted that the injunction applied only to those listed in it and the particular prohibited conduct. It consequently did not have a chilling effect on the First Amendment Rights of others.<sup>1522</sup>

The vagueness doctrine in US law (which is analogous to the same doctrine in South Africa), as discussed in Chapter 5 of this dissertation, is concerned with the

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<sup>1515</sup> The First Amendment to the US Constitution holds that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

<sup>1516</sup> 14 Cal.4th 1090 (1997).

<sup>1517</sup> *Acuna* 1110 quoting *Dallas v. Stanglin* 490 U.S. 19 (1989) at 25.

<sup>1518</sup> *Acuna* 1110-1111. Also see *Roberts v. United States Jaycees* 468 U.S. 609 (1984) at 619.

<sup>1519</sup> *Acuna* 1111-1112.

<sup>1520</sup> *Acuna* 1112 quoting *Madsen v. Women's Health Center, Inc.* 512 U.S. 753 (1994).

<sup>1521</sup> *Acuna* 1113. Also see *Thornhill v. Alabama* 310 U.S. 88 (1940) at 97.

<sup>1522</sup> *Acuna* 1114.

adequate notice in terms of due process.<sup>1523</sup> This means that persons who may be affected by a law must adequately be informed of the contents thereof.<sup>1524</sup> The Court refers to guiding principles endorsed by the US Supreme Court. The first principle relates to the particular context<sup>1525</sup> and the second relates to “reasonable specificity”<sup>1526</sup> but “mathematical certainty” cannot be expected.<sup>1527</sup> Brown J held that the injunction was not vague if one considers the purpose clause set out in the injunction and subsequently interprets the terms of the injunction in *that* context.

### **6 6 1 5      *Potential adoptability in South African law***

Neither control orders nor injunctions are known in South Africa. The closest analogue is the public nuisance notices, which are known domestically (through municipal ordinances and legislation and to a lesser extent the common law). This section shall briefly investigate to what extent South Africa currently has the legal framework to incorporate or adopt *injunctions* within our existing legal framework and whether these measures are compliant with our constitutional framework.

#### **6 6 1 5 1      *Public nuisance in South Africa***

There appears to be no precise formulation of a public nuisance in South African law.<sup>1528</sup> A useful definition appears from the Cape Municipal Ordinance 20 of 1974 where it was stated:

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<sup>1523</sup> *Acuna* 1115.

<sup>1524</sup> See 5 3 2 4 1 1 below for a comprehensive discussion in the South African context as well as a discussion relating to vagueness challenges to STEP.

<sup>1525</sup> See *American Communications Assn. v. Douds* 339 U.S. 382 (1950) at 412.

<sup>1526</sup> *Acuna* 1116-1117. Brown J quoting from the judgement in *Coates v. City of Cincinnati* 402 U.S. 611 (1971) at 614.

<sup>1527</sup> *Acuna* 1117 quoting *Grayned v. City of Rockford* 408 U.S. 104 (1972).

<sup>1528</sup> See J Church & J Church “Nuisance” in WA Joubert & JA Faris (eds) *LAWSA* 19 2 ed (2016) para 212.

[a]n act or omission constitutes a public nuisance in South African law when said action is harmful or offensive to rights of the public at large and usually pertains to their health, comfort, safety or general well-being.<sup>1529</sup>

The *locus standi* for a public nuisance would usually lie with the State considering that a public nuisance per definition usually pertains “to the rights of the public at large” and therefore every affected victim cannot reasonably be expected to pursue legal action.<sup>1530</sup> This would both be impractical and unfair to the affected person and the person causing the alleged nuisance. It seems that the prosecution of instances of common law public nuisance has fallen into disuse due to nuisance offences mainly being regulated through statute or the prohibited conduct constituting independent crimes (which are not described as a “nuisance”).<sup>1531</sup>

Samuels however notes that certain instances of public nuisance have been received into the common law and can be categorised into one of three manifestations, evidenced by three distinct series of cases.<sup>1532</sup> The first category, applicable to this discussion, is in line with the original intent of this remedy, namely to protect public health and safety.<sup>1533</sup> In the case of *R v Paulse* (“*Paulse*”),<sup>1534</sup> for example, the Supreme Court of the Cape of Good Hope dealt with a case where the appellant was operating a brothel which was apparently in full view of the public and therefore caused

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<sup>1529</sup> Section 1; Church & Church “Nuisance” in *LAWSA 19 2* para 214 fn 6; A Samuels *The history, development and future of public nuisance in light of the Constitution* LLM thesis Stellenbosch University (2010) 27-28. Samuels points to the confusion and conflation between public and private nuisance. The author refers to Abrams & Washington who point to the three most significant differences or distinguishing factors between the two. According to Abrams & Washington, public nuisance relates to public health and safety, annoyance or substantial inconvenience to the public. This is in contrast to a private nuisance which relates to the enjoyment of private property. Secondly, public nuisance is an annoyance or violation shared among the general public, thus, not just a particular individual or household for example. The third reason relates to *locus standi*. Public nuisances are mainly perused by public authorities (save for the example of an action in tort for a public nuisance). See R Abrams & V Washington “The misunderstood law of public nuisance: A comparison with private nuisance twenty years after Boomer” (1990) 54 *Albany Law Review* 359 364-365.

<sup>1530</sup> See Church & Church “Nuisance” in *LAWSA 19 2* para 212 referring to *Diepsloot Residents’ and Landowners Association and Others v Administrator, Transvaal, and Others* [1993] 1 All SA 132 (T).

<sup>1531</sup> Church & Church “Nuisance” in *LAWSA 19 2* para 214-215; Samuels *Public nuisance* 73-74.

<sup>1532</sup> A Samuels “Note on the use of public nuisance doctrine in 21<sup>st</sup> century South African Law” (2015) *De Rebus* 181 181.

<sup>1533</sup> Samuels (2015) *DR* 181 182.

<sup>1534</sup> (1892) 9 SC 422.



“great damage and common nuisance of persons there residing and passing”. The Court furthermore stated that the conduct of the participating parties was “disgraceful and disgusting”.<sup>1535</sup> De Villiers CJ cited Van der Linden to support the finding that the keeping of a brothel constituted an “indictable offence” but the prosecution of the crime was rare during that time (which was 1892) save for “flagrant” instances. The Court agreed with the decision of the court *a quo* and upheld the conviction and the appeal was consequently dismissed.<sup>1536</sup>

Samuels points out that public nuisance is mostly utilised by municipalities in an anticipatory fashion to prevent certain harms from occurring or as a form of punishment after the harm or conduct has ensued. A person may then be punished either through criminal sanction or an injunction requesting the violating parties to cease interference with the rights of the affected parties.<sup>1537</sup>

US gang injunctions are clearly an amalgamation of these two options: an injunction requesting the relevant parties to cease their unlawful behaviour and the imposition of a criminal sanction due to non-compliance with the injunction.

## **6 6 1 5 2      Possible approaches**

There is nothing preventing the Western Cape Government (for instance) from enacting a statutory nuisance law or relying on the common law public nuisance. The model for achieving this can be substantially similar to that of the US, namely by prosecutors gathering evidence from affected communities. Sufficient evidence must be followed by proscribing the type of conduct that the (alleged) gang members may not engage in and/or areas they may not trespass. Such an approach requires active policing of an area.

Considering the particularly violent nature of gangs in the Western Cape, the efficiency of injunctions is however doubted. The potential usefulness may lie in violating the injunction. This sets a low threshold and standard for proving guilt – albeit for a comparably insignificant offence compared to the business of criminal gangs. This might serve to unnerve – even if temporarily – the business of criminal gangs.

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<sup>1535</sup> *Paulse* 422-423.

<sup>1536</sup> *Paulse* 422-423.

<sup>1537</sup> *Samuels Public nuisance* 71-72.

Control orders transcend mere injunctions due to the declaration of the particular group as unlawful and does not require individual members to be enjoined from associating with the association. The association itself is unlawful and not only the participation in unlawful activities, which is largely what POCA is based upon. Control orders may be used in a similar vein. This scheme however has the additional value of targeting the gang structure *directly* by making it a crime through associating with outlawed groups. There is admittedly room for abuse of such a measure. The initial declaration of a group must be done with close scrutiny of all the evidence in order to avoid declaring otherwise lawful associations as unlawful. The Singaporean approach of requiring the registration of all associations may be a more onerous option. This might require an overhaul of legislation dealing with the registration of companies<sup>1538</sup> or the enactment of additional legislation and placing additional obligations over and above those imposed by the Financial Intelligence Centre Act 38 of 2001 read with the relevant provisions in POCA.<sup>1539</sup> On the other hand, it could serve as an additional mechanism to weed out unlawful associations but would not necessarily target the criminal gangs in the desired fashion.

### **6 6 1 5 3      *Constitutional and doctrinal issues***

The labelling/registration models might constitute the most blatant apparent infringement on constitutional rights and freedoms. The NSW labelling model infringes especially the right to freedom of association<sup>1540</sup> and the Singaporean registration model infringes on the presumption of innocence of an accused.<sup>1541</sup> The right of freedom of association was discussed in greater detail in Chapter 5.<sup>1542</sup>

Control orders will undoubtedly be *extremely* controversial given the history of South Africa, which saw numerous pieces of legislation criminalising free association.<sup>1543</sup> This included the Separate Amenities Act 49 of 1953; the Group Areas

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<sup>1538</sup> Such as the Companies Act 71 of 2008.

<sup>1539</sup> See section 7A of POCA especially.

<sup>1540</sup> Section 18 of the Constitution.

<sup>1541</sup> Section 35(3)(h) of the Constitution.

<sup>1542</sup> 5 4 above.

<sup>1543</sup> S Woolman "Freedom of Association" in S Woolman, T Roux, M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 06-08) 44.2-6 fn 3.

Act 41 of 1950;<sup>1544</sup> the Prohibition of Mixed Marriages Act 55 of 1949; the Suppression of Communism Act 44 of 1950; the Internal Security Act 74 of 1982 and the Prohibition of Foreign Financing of Political Parties Act 51 of 1968. Most analogous to control orders is the repealed Unlawful Organizations Act 34 of 1960 (“the UOA”). This Act empowered the Attorney General (“AG”) to, without notice, declare “all branches, sections or committees” including “all local, regional or subsidiary bodies” of the African National Congress or the Pan Africanist Congress as unlawful organisations if such AG was satisfied that safety of the public or maintenance of public order were seriously threatened or likely to be seriously threatened by these organisations.<sup>1545</sup>

These pieces of legislation were enacted to criminalise intimate and societal relations between different races and to hamper political protest of the apartheid regime. Woolman submits that the criminalisation of certain organisations would be “uncontroversial” but the author is however mindful of how legislation could be used to *discriminate* rather than to protect, thus undermining the legitimate goal of protecting society. He also submits that legislation criminalising associations must be subjected to careful scrutiny.<sup>1546</sup> This author does not fully agree that the criminalisation of organisations would be “uncontroversial” due to the fear of the general public that any type of association (including that of an intimate nature with family members or romantically) with an unlawful organisation might be construed as a criminal act. That is why a declaration of unlawfulness would, in essence, be of no practical effect unless it is coupled with some sort of activity that may be construed to further the activities of the outlawed organisation. A control order prohibits people belonging to a declared organisation from associating with one another; with the underlying assumption being that this would disrupt the criminal structure and activities of said group. Criminalising the mere belonging to a group *would* be controversial because belonging to a group does not *per se* mean that you are furthering their criminal agenda.

It was referred to above that there was some backlash from human rights organisations initially regarding POCA, including a potential violation of the freedom of association. The original Prevention of Organised Crime Bill 118 of 1998 [B 11S-

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<sup>1544</sup> See 2 3 above for a discussion of the influence of the Group Areas Act on the development of criminal gangs in the Cape Flats.

<sup>1545</sup> Section 1 of the UAO.

<sup>1546</sup> Woolman “Freedom of Association” in *CLOSA* 44.2-1; 44.2-6 fn 3.

981 (“the Organised Crime Bill”) also contained several presumptions but those presumptions never made it into the final version of POCA,<sup>1547</sup> due to the unfavourable position towards legal presumptions in the post-constitutional era (this will be discussed more in detail below). It is therefore not so obvious that the criminalisation of criminal gangs would be “uncontroversial”.

A further problem is the operation of the presumptions under the Singaporean model. Presumptions operate against a person who is found to be in possession of paraphernalia related to an unlawful society. That person is not only presumed to be a member of the unlawful society but shall also be presumed to be involved in the management of said society.<sup>1548</sup> Legal presumptions and reverse onuses have largely fallen in disfavour since the advent of the Constitution and a crescendo of judgments by the Constitutional Court ensued, declaring them to be unconstitutional.<sup>1549</sup> The most notable is *S v Coetzee* (“*Coetzee*”)<sup>1550</sup> and *S v Zuma* (“*Zuma*”).<sup>1551</sup> The crux of these judgments was that the imposition of a duty by a statutory provision on the defendant to disprove an element of the crime, while reasonable doubt existed as to their guilt, such a provision would constitute a reverse onus and violate the presumption of innocence of an accused and in a broader context their passive defence rights.

These types of models are probably not in line with the models in terms of the Palermo Convention and therefore do not, on their own, fulfil South Africa’s obligations in terms of the Convention. Thus, labelling and registration could not be the *only* mechanisms addressing organised criminal groups.

## 6 7 Concluding remarks: alternative measures addressing gang activity under foreign and international law

The preceding analysis of foreign and international criminal law provides a range of alternative models for holding the leaders or the members of criminal gangs criminally,

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<sup>1547</sup> See above at 4 2 and 4 5 1 1 3.

<sup>1548</sup> Section 21(2) read with section 21(2) of the Societies Act.

<sup>1549</sup> See PJ Schwikkard & SE van der Merwe *Principles of Evidence* (2016) 553-561 for an overview of these judgements; GP Kemp “Die Grondwetlikheid van statutêre vermoedens” (1998) 9 *Stellenbosch Law Review* 106-114 for a discussion of *Coetzee*.

<sup>1550</sup> 1997 (3) SA 527 (CC). Also see a discussion of the *ratio decidendi* at 3 3 4 above.

<sup>1551</sup> 1995 (4) BCLR 401 (CC).

and in some instances, civilly, responsible. These models, despite having parallels in South African law, offer unique ways in dealing with criminal gang activities. Unlike most provisions of POCA, they do not merely codify existing common law measures.

More severe punishment is required especially for gang leaders, as their conduct is considered to be exponentially more reprehensible despite the lack of physical contributions to the crimes perpetrated by gang members.<sup>1552</sup> The foreign and international models discussed above all have South African parallels which would provide a foundation for their incorporation into South African law – preferably through a carefully drafted statute. Mere duplication of laws is however strongly discouraged as this was the error made during the drafting of POCA.<sup>1553</sup> There is however also room for judicial development, as per the constitutional mandate of the courts (an aspect discussed in the introductory section).<sup>1554</sup> Development of the common law must however always take place cognizant of the principle of legality.<sup>1555</sup>

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<sup>1552</sup> See 6 2 above.

<sup>1553</sup> See Chapter 4 2 above.

<sup>1554</sup> See 6 1 above.

<sup>1555</sup> See 5 3 2 above.

## Chapter 7

### Recommendations and concluding remarks

#### 7 1 Review of research aims

It must, in conclusion, be evaluated whether this study has achieved its research aims.

#### 7 1 1 *The state of gang activity and the protection of individual rights*

This dissertation, an academic project, is premised on a painfully obvious and harsh reality: many South African communities are terrorised by criminal gangs on a daily basis, thus affecting the lives of real people in a very real way. Chapters 1 and 2 provided an overview of the current state of the gang crisis in South Africa, but in particular the Cape Flats in the Western Cape, which serves a grim reference point for this dissertation. This grim reality is juxtaposed with an evidently imperfect legal response, which is even more glaring if viewed through the prism of a transformative Constitution that seeks to make South Africa a better place to live for *all* its people and communities.

The preamble of POCA, amongst other things, notes that “(...) the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights” and that gangs have infringed on those rights that the State is obliged to protect. Gangs are specifically referenced, and it is stated that every person has the right “(...) to be protected from fear, intimidation and physical harm caused by the criminal activities of violent gangs and individuals” and further also that gang violence has “the potential to inflict social damage” and that gang members’ “pervasive presence” in communities are harmful to those communities.

An important theme in this dissertation was the protection of individual rights: both those of the accused as well as those of the communities affected by gang activity.<sup>1556</sup> The preamble does not reference the rights of the accused at all (these rights are, of course, pertinently protected in the Constitution, relevant legislation and the common law) but the rights of individuals and communities as victims of crime are positioned

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<sup>1556</sup> See Chapter 5 2 and 5 3 especially.

centrally as a rationale for the promulgation of the Act. The available data shows a high incidence of gang-related crimes, which are often violent in nature and claim the lives of innocent bystanders and which are responsible for the systematic terrorisation of the Cape Flats communities. The SAPS has indicated a large number of gang-related arrests between 2016 and 2017 but these arrests did not translate into a high number of convictions. Chapter 2 referenced how dissatisfied members of Cape Flats communities are with the lacklustre State intervention. Severe police understaffing in the areas most affected by gang activity further aggravates this problem. This dissatisfaction is also justified by the fact that almost one in every five murders is attributed to gang activity. The majority of gang wars, furthermore, have occurred *after* the enactment of POCA without any sign of significantly increased conviction rates. This therefore points to a significant failure by the State.

This dissertation does not pretend to be a comprehensive socio-legal study of the origins, causes and incidence of gangs and criminal gang activities as criminal phenomena. Where appropriate, the relevant socio-economic, socio-political and socio-legal contexts were taken note of, not for interest sake, but to serve the purpose of contextualising developments in criminal law as they pertain to the legal strategies dealing with criminal gangs. The task at hand was thus to critically examine the most prominent anti-gang legal strategy in South Africa, namely Chapter 4 of POCA, with reference to relevant general principles and specific offences under South African criminal law, foreign law and general principles as developed in international criminal law.

## 7 1 2      *An analysis of Chapter 4 of POCA and the common law relating to group criminality*

The main objective of this study was to provide, as the title and introduction suggest, a critical and comparative analysis of South Africa's anti-gang *legislation*. This was achieved in Chapter 4 by analysing and deconstructing the elements of the offences and sentences enumerated in Chapter 4 of POCA, as well as the associated definitions in POCA Chapter 1. The overarching conclusion is that Chapter 4 of POCA is no more than a collection of statutory iterations of the previously existing common and statutory laws of South Africa. As pointed out in Chapter 4, if one operates from the assumption that POCA Chapter 4 was enacted due to the ineffectual common and statutory laws; and if POCA emulates these very common law offences, then POCA



is equally as ineffective at combating gang-related crime and is therefore largely superfluous.<sup>1557</sup> The structural and legal similarities were highlighted in Chapters 3 and 4 of the dissertation. The analysis in Chapter 3 of the common law and statutory measures that pre-existed POCA showed the ineffectiveness in disrupting the functioning of criminal gangs. It is submitted that measures such as the common purpose doctrine remains constitutionally and doctrinally contentious but serves an useful function in criminal prosecutions in South Africa. Certain suggestions are however made for the development of the common purpose doctrine, especially in the light of important developments in the UK concerning the doctrine of joint criminal enterprise.<sup>1558</sup>

It was argued that there are very limited differences between the common modalities available in addressing group-based crime and Chapter 4 of POCA. These differences include the sentence enhancements<sup>1559</sup> and the fact that POCA section 9 adds an additional layer of criminalisation for gang-related offences over and above existing common law and statutory offences for which gang members might be prosecuted. Only<sup>1560</sup> section 9(2)(c) is innovative in that it criminalises gang recruitment. While it would certainly constitute conspiracy, incitement or fall under the common purpose doctrine to recruit someone to join in a gang-related *crime*, gang membership is not in itself a crime and the aforementioned measures require the planned commission or commission of an offence. Save for the innovation under section 9(2)(c), the enhancements could have been relegated to a schedule as the rest of POCA. Chapter 4 adds no significant value and the rest of the Chapter could have been left out completely.

From the analysis above, it becomes clear that Chapter 4 of POCA adds nothing to disrupt the criminal *structure* of gangs. An additional form of punishment that may prohibit gangs from operating “freely” may be the answer. Punishing gang members

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<sup>1557</sup> See 3 7 and 4 6 especially.

<sup>1558</sup> See *R v Jogee* [2016] UKSC 8; Chapter 3 3 6 1 3 above.

<sup>1559</sup> Sections 10(2) and 10(3) of POCA.

<sup>1560</sup> Snyman also argues that section 9(2)(a) goes far beyond the scope of the common and statutory law due to its potential broad application. Although this author does agree that the section is broad in scope, it is not agreed that it is of the wide-ranging nature which Snyman describes. See CR Snyman “Die nuwe statutêre misdaad van deelname aan 'n kriminele bende” (1999) 12 *South African Journal of Criminal Justice* 213 220-221; Chapter 4 5 2 4 1 above.

for gang-related offences does nothing to disempower the gang. Chapter 6 of POCA, for example, empowers the forfeiture of property. This *disrupts and disempowers* the proper functioning criminal enterprise (which may also be a gang).

Chapter 4 of POCA was drafted during a period rife with gang conflict and was therefore drafted *in reaction to* this conflict. It is suggested here (based on the legislative history and contemporary debates in parliament) that this legislation was drafted as political appeasement in response to the complaints from the affected communities, like those on the Cape Flats. POCA can however not be said to have been drafted in bad faith and the Legislature seems to have had at least some intention of drafting powerful legislation to battle the gangs. This is evidenced by statements by former President Nelson Mandela during the parliamentary debates regarding the Organised Crime Bill 118 of 1998 [B 11S-981] where it was said that the State would “fight fire with overwhelming fire” when it comes to gangs and that they would face “heavy prison sentences”.<sup>1561</sup> Similar parliamentary threats have re-emerged in 2017 when the then Minister of Police, Fikile Mbalula, addressed gangs directly and warned “I am coming for you hard – enough is enough.”<sup>1562</sup> Reactions to the genuine outcry of the Cape Flats communities must, however, not just be met with grandiose proclamations or ambitious policies or projects such as Project Fiela,<sup>1563</sup> 24-hour drone surveillance<sup>1564</sup> and the National Anti-Gasterism Plan.<sup>1565</sup> Although the newly established 95-member Anti-Gang Unit (operating within Bishop Lavis, the Nyanga cluster as well as Bonteheuwel) is greatly welcomed, this author is concerned about

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<sup>1561</sup> Debates of the National Assembly of 1998: 14 September to 6 November vol 21 8051.

<sup>1562</sup> Parliamentary Committee on Police “Crime Statistics 2016/17: SAPS briefing” *Parliamentary Monitoring Group* (24-10-2017) <<https://pmg.org.za/committee-meeting/25303/>> (accessed 26-10-2017).

<sup>1563</sup> See 2 2 above.

<sup>1564</sup> Parliamentary Committee on Police “Crime Statistics 2016/17: SAPS briefing” *Parliamentary Monitoring Group*.

<sup>1565</sup> See discussion in Chapter 1 4 above.

its sustainability considering the general understaffing of police stations and lack of new recruits.<sup>1566</sup> A sustainable and principled legal strategy is called for.

Chapter 4 and especially Chapter 1 of POCA contain provisions which are constitutionally suspect. Chapter 1 enables a court to make a finding that a group constitutes a “criminal gang”; or has committed a “pattern of criminal gang activity”, by utilising a “nontechnical” meaning of these terms. Section 9(2)(a) also utilises the phrase “pattern of criminal gang activity” in its text. This is in violation of the fair warning doctrine as well as the principles under *ius certum* and *ius strictum*. This author is uncertain to what extent this problem has manifested due to the lack of reported case law. In *S v Jordaan and Others* WCC 16-11-2017 case no CC20/2017 (“*Jordaan*”), Binns-Ward J however acknowledged the uncertainty relating to the definition of “pattern of criminal gang activity”.<sup>1567</sup> Binns-Ward J appeared to acknowledge both the statutory and nontechnical definitions as legitimate alternatives (even though it was held that the State failed to adduce sufficient evidence of the requisite pattern under either construction).<sup>1568</sup> It is however troubling that by 2018, almost twenty years after the enactment of POCA, there is still no legal certainty regarding two of the key definitions in the Act.

These definitions therefore require amendment to create legal certainty and fair warning and to affirm the principles of *ius certum* and *ius strictum*. Section 10(3) furthermore violates freedom of association and provides for increased sentences for merely being a member of a criminal gang, without a link to gang-related offences or there being proof that said gang member actually contributed to the gang in any fashion. For example, where a gang member is found guilty of a traffic offence, having

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<sup>1566</sup> See Plato “MEC Dan Plato: Briefing on provincial policing needs and priorities” Western Cape Government; JM Pienaar, W Du Plessis & NJJ Olivier “Onrus en Geweld: 2014 (2)” (2014) 29 *Southern African Public Law* 566 566; DA “50% decline in Police Academy graduates is shrinking already understaffed SAPS” (16-05-2016) DA <<https://www.da.org.za/2016/05/50-decline-in-police-academy-graduates-is-shrinking-already-under-staffed-saps/>> (accessed 21-03-2017); L Daniel “Cape Flats gets new anti-gang unit thanks to national police ministry” (01-11-2018) *The South African* <<https://www.thesouthafrican.com/cape-flats-gang-unit-national-government/>> (accessed 02-11-2018); *EWN* “Cele Hails Success of Cape's New Anti-Gang Unit” (15-11-2018) *Eyewitness News* <<https://ewn.co.za/2018/11/14/cele-hails-success-of-cape-s-new-anti-gang-unit>> (accessed 15-11-2018).

<sup>1567</sup> *Jordaan* paras 134-136; Chapter 4 5 1 2 and 4 5 2 4 1 above.

<sup>1568</sup> *Jordaan* paras 134-136.

no relation to the gang or its activities at all, such a gang member could be liable for increased punishment. Such a position is wholly untenable, irrational and unconstitutional and requires immediate amendment. These amendments shall be discussed in the following section.

### 7 1 3 *Alternative measures in holding gang leaders and gang members criminally responsible*

A further research aim of this dissertation was to investigate alternative models for the criminalisation of organised criminal groups under foreign and international law and compare these models to the South African regime. The purpose of this exercise was to evaluate whether any of these means could be used to supplement or replace the current South African approach.

It is strongly suggested, firstly, that more invasive measures be implemented to disrupt the organisation and functioning of gangs. Merely punishing gang members does not disrupt the criminal structure or functioning of the gang. Convicted members are merely replaced and are forced or allocated into prison gangs. Secondly, it is suggested that there be harsher punishments for gang *leaders* and that they should be held *directly* accountable for unlawful acts committed by subordinate gang members.

This author submits that while many of the jurisdictions that implement anti-gang legislation or measures compare favourably with the South African approach, and while there are certain measures that could prove useful, some would nevertheless be controversial. *Labelling* of criminal gangs may prove to be an infringement of freedom of association as well as of the presumption of innocence and may place a reverse onus on gang members who want to challenge a finding that he or she is a gang member – or if such a person wants to have the so-called control order (which limits the liberties of the accused) amended. The *registration model*, as followed in Singapore, which compels all associations to be registered and criminalises failure to do so (such as gangs who do not fall within the registrable categories) may prove to be too administratively laborious and could prove disastrous in a South Africa already struggling with an overburdened administrative state and criminal justice system.

*Civil injunctions* could furthermore be issued against gangs. This would prohibit them from associating with other (known) gang members and from operating in certain areas. This would potentially infringe on freedom of association as well as the freedom

of movement of gang members. These injunctions may also prove to be ineffectual or impracticable due to the severe understaffing of police stations in gang hotspots.

More fruitful findings were made in relation to the *direct criminal accountability* of gang leaders. Potential models for holding gang leaders responsible were found in the general part of international criminal law, Australian and German criminal law. The models were analysed in the context of accountability for organised crime leaders, and this dovetails nicely with the sentiments expressed in the preamble of POCA, which fails to follow through in the operative part of the statute with specific modes of liability for gang leaders.<sup>1569</sup> The doctrine of command or superior responsibility, which holds superiors or commanders responsible for unlawful acts of their subordinates, is especially appropriate in this regard. Again, the submission is not that principles of international criminal law are directly applicable to the criminal phenomenon of gangsterism in South Africa. There is no direct criminal liability for gangsterism under international law (compared to, say, war crimes or crimes against humanity). The proposition in this dissertation is that the gravity and scale of gangsterism in areas like the Cape Flats are such that the phenomenon is indeed comparable to some of the serious structural and hierarchical crimes under international law, such as war crimes and crimes against humanity. Indeed, the numbers and impact of gangs in Metropolitan Cape Town is such that the governing party in the Western Cape Province has asked for the deployment of the military, thus transforming a criminal justice response into a quasi-military response.<sup>1570</sup> The merits of a military response to the problem of gangsterism will not be debated here, but the request to deploy the military illustrates the fact that the criminal gangs operate on a scale and with hierarchies and command structures reminiscent of rebel groups or quasi-military organisations. And the conduct of these groups is subject to the general principles and modes of liability provided for in international criminal law instruments, such as the Rome Statute of the ICC. The submission is that there are lessons to be learned that

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<sup>1569</sup> Section 2(1)(f) criminalises the management of a “criminal enterprise” as a racketeering offence. This carries a heavy punishment of R1 000 million or up to life imprisonment. This offence however carries a heavy evidentiary burden and not hold the gang leader directly accountable for crimes committed by subordinates.

<sup>1570</sup> R Davis “DA wants to send the army into the Cape Flats – communities, not so much” (19-07-2018) *Daily Maverick* <<https://www.dailymaverick.co.za/article/2018-07-19-da-wants-to-send-the-army-into-the-cape-flats-communities-not-so-much/>> (accessed 19 August 2018).

can benefit the development of South African criminal law as it responds to the structural problems of organised crime and gangsterism. In short: gangs, especially supergangs, simply fall apart without leaders. Modes of liability which focus on *leadership* are thus indispensable in terms of a comprehensive legal strategy to combat gangs and criminal gang activities.

Command or superior responsibility, as developed in international criminal law, can be employed to create criminal liability for gang leaders for the unlawful acts carried out by subordinates. This would be different from modes of liability currently available under South African criminal law, such as conspiracy and common purpose. The essence of command or superior responsibility is the element of effective control. This is especially apt for criminal gangs as they often operate in a pseudo-military fashion. Control through an organisation, where liability for unlawful acts can be attributed to the control of a certain gang leader of the gang, is equally as appropriate. This doctrine could prove useful where individual gang members may not be *criminally* liable for a crime but is *factually* responsible, as this doctrine does not require legal guilt on the part of the subordinates in order for liability to ensue for their leader.

This author is cognizant of the fact that these alternative measures are constitutionally problematic, possibly even more so than the textual problems in POCA Chapter 1 and the issues with section 10(3). However: if courts are willing to repeatedly acknowledge the common purpose doctrine as constitutionally sound despite its glaring constitutional issues, on the basis that it is justifiable on the grounds of policy considerations (to deal with the “significant societal scourge” of group criminality),<sup>1571</sup> then these alternative means should equally be justifiable. This author also acknowledges that the constitutional issues discussed in Chapter 5 of this dissertation may be justified if the State were to adopt stricter mechanisms, as suggested above, to deal with gangs. This refers back to the constant tension described in Chapter 5 between the fair trial and related constitutional rights of the accused and the rights of the inhabitants of the state to be protected from all forms of violence.

The conclusion of this dissertation is not that POCA Chapters 1 and 4 should be repealed. The baby should not be thrown out with the bathwater. The ensuing sections shall provide suggestions as to the textual amendments to Chapters 1 and 4 of POCA

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<sup>1571</sup> *S v Thebus and Another* 2003 (6) SA 505 (CC) para 34.

and provide suggestions as to how the measures as suggested above should be drafted.

## 7 2 Amendments to the text of Chapters 1 and 4 of POCA

It was emphasised in the preceding chapters that certain important textual amendments are required to render certain provisions in Chapters 1 and 4 of POCA constitutionally sound. The changes in Chapter 1 are minor and ensure compliance with the *ius certum* and *ius strictum* principles; provide fair warning to potential accused as well as legal certainty. Constitutional jurisprudence has shown us the standard for statutes to comply with constitutional norms.<sup>1572</sup> Chapters 1 and 4 of this dissertation illustrated that a legal definition for a gang is elusive and wide-ranging; the notion of a criminal gang is comprised of a set of characteristics. It is therefore dangerous to rely on a nontechnical definition of a gang as such a definition is not susceptible for reasonable interpretation and application.<sup>1573</sup>

It is proposed that the definition of “criminal gang” should read as follows:

*'criminal gang' includes [means] any formal or informal ongoing organisation, association, or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;*

The definition of a “pattern of criminal gang activity” should be amended in a similar way to read:

*'pattern of criminal gang activity' includes [means] the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed*

*(a) on separate occasions;*

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<sup>1572</sup> See Chapter 5.

<sup>1573</sup> See *Affordable Medicines Trust and Others v Minister of Health and Others* para 133; 5 3 2 2 1 above.



*(b) on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang;*

In addition to these amendments, the following provision should be added to Chapter 4, preferably as section 9(3):<sup>1574</sup>

***[The court may hear evidence, including evidence with regard to hearsay, similar facts or previous convictions, relating to offences contemplated in subsections (1) and (2), notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render a trial unfair.]***

There is no reason for not including a similar provision empowering the use of these otherwise inadmissible types of evidence such as with section 2(2) of POCA. The inclusion of such a provision could also avoid possible future attacks on Chapter 4 as it has no empowering provision to allow for the use of (especially) previous convictions.

It can be argued that previous convictions are permissible, *generally*, through section 211 of the CPA (because the predicate offences may be considered “an element of any offence with which an accused is charged”) and hearsay evidence through the exceptions listed under section 3(3) of the Law of Evidence Amendment Act 45 of 1988 (“the LEAA”). There is however no indication whether similar fact evidence or hearsay evidence is permissible in these gang-related cases such as with racketeering cases. Section 2(2) is broader in application and lowers the admissibility threshold because it allows for these vexed categories of evidence where they are usually inadmissible (save for the qualification of not rendering the trial unfair). Similar fact evidence is nonproblematic in this regard because the predicate acts can be justified as elements of another offence under section 211 of the CPA. The threshold for hearsay under the LEAA is arguably much higher than that of POCA and great judicial care should be taken in allowing hearsay in POCA Chapter 4 cases – and it should under the current legal framework only be allowed under the LEAA exceptions. Courts should therefore take care in using the correct legislative framework in allowing these types of evidence and not treat allowing it as a matter of course because it is a POCA-related case. Legal certainty and streamlining of POCA is therefore required.

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<sup>1574</sup> This text is based on section 2(2) of POCA.

There is no reference to a “serious” offence or crime in the definition of a “pattern of criminal gang activity” such as with other comparable legislation or instruments. Article 1(1) of the Framework Decision by the Council of the European Union 2008/841/JHA of 24 October 2008 on the Fight Against Organised Crime (“the Framework Decision”) requires a “criminal organisation” to have committed “(...) offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty”. The Canadian Code in section 467.1(1) also provides that a

serious offence means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

STEP does not make reference to the seriousness of the offence or minimum prison sentences, but the offences are at least, *prima facie*, relating to gang activity. The Palermo Convention (also bearing in mind that the wording of the Convention is not binding on its member states) requires in article 2(a) that an “organized criminal group” shall have “the aim of committing one or more serious crimes or offences (...)”.<sup>1575</sup> A “serious crime” is further defined as conduct punishable by a minimum of four years deprivation of liberty “or a more serious penalty”.<sup>1576</sup>

Items 21 (“offences relating to the coinage”) and 26 (“any offence relating to exchange control”) of Schedule 1 of POCA are out of step with the rest of the items contained in Schedule 1. Section 34(1)(f) of the South African Reserve Bank Act 90 of 1989 served as an example and was criticised above.<sup>1577</sup> This provision makes “the act of defacing, soiling, damaging or attaching drawings to any coin which is legal tender” an offence. The punishment for this offence is a fine not exceeding R250.<sup>1578</sup> Considering the other types of offences in listed in the Schedule 1 and the specific inclusion of the term “serious offence” or “serious crime” in comparable instruments, it is submitted that the retention of Items 21 and 26 become unjustifiable and they should be removed from Schedule 1. It is further submitted that persons who might be subjected to Chapter 4 of POCA cannot with reasonable certainty be expected to

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<sup>1575</sup> Article 2(a) of the Palermo Convention.

<sup>1576</sup> Article 2(b) of the Palermo Convention.

<sup>1577</sup> See 4 5 1 1 1 as well as 5 3 2 2 1 above.

<sup>1578</sup> Section 34(iv) of the Reserve Bank Act.

ascertain how they should adjust their conduct in order to avoid prosecution and this is therefore also in violation of *ius certum*.<sup>1579</sup>

Further, POCA section 10(3) must be amended in the following manner, based on the corresponding sentence enhancement under section 186.22(b)(1) of STEP:

*If a court, after having convicted an accused of any offence, other than an offence contemplated in this Chapter, finds that the accused was a member of [or active participant in] a criminal gang at the time of the commission of the offence [and committed such offence for the benefit of, at the direction of, or in association with any criminal gang], such finding shall be regarded as an aggravating circumstance for sentencing purposes.*

Such an enhancement would be justifiable, and it would punish statutory and common law crimes other than the crimes committed in Chapter 4 of POCA while having a rational link between the crime and the furtherance of gang-related activity. There is also no apparent reason why active participants to a gang should not be punished under such a sentence provision – either in the original or amended form. An “active participant” in a gang logically has at least contributed to the gang in some way but that is not necessarily true of a gang member. The inclusion of the term “or active participant” justifiably expands the scope of the criminal net to include those who contribute to the criminal gang.

The current application of POCA section 10(3) is to punish mere association. No rational link exists between punishing persons for crimes that are not gang-related. There is no law prohibiting *membership* to a criminal gang, including POCA. Therefore, punishing persons (by increasing their sentences) based on membership alone constitutes a violation of the constitutional right to freedom of association and is arbitrary and irrational. This author is cognizant that this right is not unlimited. However, it can surely not be argued that merely belonging to a criminal gang – without proof that someone has in fact furthered the objectives of such a gang by committing criminal offences – and increasing the punishment of such a person is justifiable. Whether criminal organisations are even deserving of constitutional protection under section 18 of the Constitution is still subject to academic debate<sup>1580</sup> but there is no

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<sup>1579</sup> See 5 3 2 2 1 above.

<sup>1580</sup> See 5 4 1 above.

judicial or legislative basis supporting such an argument currently in South Africa. If this is in fact the case (which this author submits it is not), POCA section 10(3) would have to be justified through section 36 of the Constitution. It was however submitted above<sup>1581</sup> that section 10(3) would not be justifiable under section 36 as the legitimate governmental objective in curbing criminal gang activity is not achieved through the sentence enhancement.

What is certain, however, is the principle of personal guilt. There is nothing justifying a violation of this principle because there is no evidence that the person involved has contributed to the activities of the gang and that there will in fact be an influence felt in the gang due to the absence. Deterrence as a theory of punishment is also insufficient here because the person is not being convicted for a gang-related crime.

### 7 3 Modes of liability, leadership and the need for direct criminal responsibility

It was argued in this dissertation that gangsterism relies on leadership, and that the scale of gangs in, for instance, metropolitan Cape Town is such that these gangs resemble rebel groups or quasi-military organisations. As such there is a lot to learn from the modes of liability as developed in international criminal law, where the emphasis often falls on the liability of leaders. It was also noted that gangsterism/criminal gang activities are not crimes under international law (yet) and the relevant international criminal law modes of liability cannot simply be applied to criminal gangs. Either courts will have to develop the law (which is not ideal in terms of the principle of legality) or the democratic principle should apply whereby parliament would take the necessary action to reform South African criminal law in response to a complex problem. Rather than taking the longer and more uncertain route of development of modes of liability under the general principles of South African criminal law, it is suggested that the following offences be included in the text of Chapter 4 of POCA in order to hold gang leaders *directly* responsible for the unlawful actions of subordinates:

***[A leader or person effectively acting as such, of a criminal gang, shall be criminally responsible for crimes committed by subordinates/gang***

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<sup>1581</sup> See 5 4 3 above.

***members under his or her effective command and control, or effective authority and control, where:***

- (a) That gang leader or person either knew or, owing to the circumstances at the time, should have known that the gang were committing or about to commit such crimes, and***
- (b) that gang leader or person failed to prevent subordinate/gang members from committing or attempting to commit such crimes.]***

There are certain benefits to such an offence. To hold the leader of a criminal gang responsible would only require proof of the existence of a criminal gang (as defined in the amended POCA) and not require the gang leader to have personally contributed to the pattern of criminal gang activity – which is in any case not a requirement for most of the other offences. There should only be proof of effective control or command. Such an offence would also solve the difficulties faced in proving conspiracy and incitement where proof of a conspiratorial plan is required or where proof of incitement influencing the mind of the incitee is required. All that is required (which may nevertheless prove difficult, but not as difficult as the aforementioned crimes) is proof of the role of the accused as at least a *de facto* leader of the gang. This person also does not have to be *the only* leader and may merely be acting as such or may have a lower rank with equally effective authority. Accountability here is based on liability for omissions, either for creating a dangerous situation through the activities of the gang and then liability should ensue for the failure to prevent or *at least restrict* unlawful activities from ensuing. The legal basis of this crime can also be founded upon the legal convictions of the society that want to hold gang leaders *directly* responsible for the actions of their subordinates – another established ground for liability for omissions.

This crime goes somewhat further than the common purpose doctrine by imposing a legal duty on a gang leader (based on the fact that he or she has created a dangerous scenario and must therefore be held liable for unlawful acts that occur as a result of creating such a scenario or failing to exercise control over it). As mentioned above, if the common purpose doctrine is justifiable on policy considerations, then such a measure can equally be justifiable.

Apart from the more direct route of creation of a new crime, one could, again, rely on general principles to achieve the aim of combating criminal gangs and gang activities. If POCA is amended to include a gang leadership crime, reliance on the doctrine of control through an organisation may be useful and there is authority indicating that such a doctrine is not incompatible with existing South African criminal law principles. The maxim *qui facit per alium facit per se* holds that “[a] person who commits an act through another person is taken as having committed it himself”.<sup>1582</sup> A model, inspired by the German Criminal Code<sup>1583</sup> as well as the application of the doctrine in *Prosecutor v. Thomas Lubanga Dyilo* (“Dyilo 2006”),<sup>1584</sup> is suggested here:

***[A gang leader shall be liable as a principal offender for an offence he or she has committed through another gang member or a person who actively associates with such a gang. Such liability will depend on:***

***(i) the existence of a hierarchically organised group over which the leader actively exercises authority over his subordinates with knowledge or consciousness of this authority.]***

#### 7 4 Concluding remarks

The rights of the inhabitants of the State to be protected from violence and the rights of the accused to have a fair trial are seemingly on two diametrically opposite ends of the constitutional spectrum; creating a constitutional dichotomy. As Harms J put it in *National Director of Public Prosecutions v King* (“King”)<sup>1585</sup>

There is no such thing as perfect justice (...) Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused’s right should be subordinated to the public’s interest in the protection and suppression of crime [...]<sup>1586</sup>

This dissertation grappled with the above-mentioned dichotomy, oscillating between fairness towards the accused to be free from arbitrary punishment, unfair or

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<sup>1582</sup> *S v Chirunga* 1998 (2) ZLR 601 (H).

<sup>1583</sup> section 25 of the German Criminal Code 1998 (*Strafgesetzbuch*).

<sup>1584</sup> ICC-01/04-01/06 (24 February 2006).

<sup>1585</sup> 2010 (2) SACR 146 (SCA).

<sup>1586</sup> *King* para 5 (footnotes omitted).

uncertain laws; and the protection of communities (such as the Cape Flats) severely affected by the pervasive presence and activities of criminal gangs.

Harms J was correct in stating that perfect justice does not exist. This however does not mean that courts, the legislature and the public should be discouraged from the pursuit of perfect justice. This dissertation's contribution to the pursuit of justice for the people of the Cape Flats and elsewhere is a proposal for the amendment of POCA as outlined above, and as fleshed out in the preceding chapters. It is submitted that this proposal is not only defensible in terms of the general pursuit of a more safe and just South Africa, but also in terms of the doctrines and principles of South African, comparative and international criminal law.

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# **Addendum A**

## **Schedule 1 to the Prevention of Organised Crime Act 121 of 1998<sup>1587</sup>**

1. murder;
2. rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
3. kidnapping;
4. arson;
5. public violence;
6. robbery;
7. assault with intent to do grievous bodily harm;
8. sexual assault, compelled sexual assault or compelled selfsexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively;
9. any offence contemplated in Part 2 of Chapter 3 or the whole of Chapter 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
10. any offence under any legislation dealing with gambling, gaming or lotteries;
11. contravention of section 20 (1) of the Sexual Offences Act, 1957 (Act 23 of 1957);

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<sup>1587</sup> Note that the 38<sup>th</sup> item on this Schedule is not numbered and appears after Item 34. This appears to be a formatting error.

12. any offence contemplated in Part 1 to 4, or section 17, 18, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004;
13. extortion;
14. childstealing;
15. breaking or entering any premises whether under the common law or a statutory provision, with intent to commit an offence;
16. malicious injury to property;
17. theft, whether under the common law or a statutory provision;
18. any offence under section 36 or 37 of the General Law Amendment Act, 1955 (Act 62 of 1955);
19. fraud;
20. forgery or uttering a forged document knowing it to have been forged;
21. offences relating to the coinage;
22. any offence referred to in section 13 of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992);
23. any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament;
24. any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969);
25. dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance;
26. any offence relating to exchange control;
27. any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones;

28. any offence contemplated in sections 1 (1) and 1A (1) of the Intimidation Act, 1982 (Act 72 of 1982);
  29. defeating or obstructing the course of justice;
  30. perjury;
  31. subornation of perjury;
  32. any offence referred to in Chapter 3 or 4 of this Act;
  - 32A. any specified offence as defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004;
  33. any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine;
  - 33A. any offence under Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013;
  - 33B. Any offence referred to in section 3 of the Criminal Matters Amendment Act, 2015;
  34. any conspiracy, incitement or attempt to commit any offence referred to in this Schedule;
- offences referred to in section 4 (1) and (2) of the Prevention and Combating of Torture of Persons Act, 2013.

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